

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,479

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED

OCT 11

Joseph W. Stewart

CLERK

SUDIE PHIPPS MERRIAM,

v.

**ANACOSTIA NATIONAL BANK,
a corporation**

and

**JOSEPH F. NEBEL
t/a Joseph F. Nebel Company,**

Appellant,
*United States Court of Appeals
For the
District of Columbia Circuit*

FILED

OCT 10 1955

Joseph W. Stewart

CLERK

Appellees.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**MILTON H. BURKE
1010 Vermont Ave., N. W.
Washington 5, D. C.
Attorney for Appellant**

(i)

No. 13,479

APPELLANT'S STATEMENT OF QUESTION PRESENTED

The question presented is whether an owner and his agent or general contractor can be held liable for their failure to provide safeguards including lighting at night and warning notices to protect pedestrians using a sidewalk abutting the owner's property which sidewalk had been broken in the course of excavation on the owner's property by vehicles driving over the same thus creating a dangerous condition.

(ii)

INDEX

	<u>Page</u>
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	2
STATEMENT OF POINTS	5
SUMMARY OF ARGUMENT	5
ARGUMENT	6
CONCLUSION	11

TABLE OF CASES

Bailey v. Zlotnick, 80 App. D.C. 117, 149 F. 2d 505	8
Baumeister v. Markham, 101 Ky. 122, 39 S.W. 844, 41 S.W. 816	9
Bell v. Brown, 76 U.S. App. D.C. 5, 128 F. 2d 317	5
Chicago v. Robbins, 2 U.S. 418 (Black) 14 L.E. 427	9
Fleming v. Fisk, 66 App. D.C. 350, 87 F. 2d 747	5
Haw v. Liberty Mutual Insurance Co., 86 App. D.C. 180, 180 F. 2d 18	10
Ross v. Hartman, 78 U.S. Appeals D.C. 217, 139 F. 2d 14	9
Thomas v. Harrington, 72 N.H. 45, 54 Atlantic 285	9

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 13,479

SUDIE PHIPPS MERRIAM,

Appellant,

v.

ANACOSTIA NATIONAL BANK,
a corporation

and

JOSEPH F. NEBEL
t/a Joseph F. Nebel Company,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant filed a complaint in the United States District Court for the District of Columbia to recover damages for an injury allegedly sustained by reason of the negligence of the appellees. The case was tried before a jury and the Court directed a verdict and judgment in favor of appellees. This appeal is taken from the judgment entered by the direction of the Court.

STATEMENT OF THE CASE

Appellant, Sudie Phipps Merriam, who was known as Sudie Phipps prior to her marriage which took place after this case was filed, was employed as a beauty operator since March of 1952 at the Atlantic Beauty Salon, 3921 South Capitol Street, in the District of Columbia. She resided at 1629 F St., N.E. and when going home from work at irregular hours she would take the bus at a stop located on the east side of South Capitol Street, slightly north of the location of the present branch of the Anacostia National Bank at 3850 South Capitol Street. For convenience appellant will refer to the appellee, Anacostia National Bank, as the Bank and the appellee, Joseph F. Nebel Company, as Nebel. In March of 1952 the Bank was the owner of an undeveloped site at what is now known as 3850 South Capitol Street which it had acquired for the purpose of building a branch office. Sometime prior to July 1, 1952, the Bank employed Nebel as its general contractor to erect a branch bank building on these premises for the Bank and Nebel, in turn, employed subcontractors to excavate the ground preliminary to commencement of construction. Among the subcontractors employed for that purposes was a steamshovel and operators and excavators. The excavators were named as party defendants in the complaint but were released as such during the pendency of the case because they were a Maryland firm and appellant was unable to perfect service of process upon them. The case proceeded to trial against the Bank and its general contractor, Nebel. The testimony and evidence showed that on the night of July 17, 1952, at about 9:30 p. m., appellant left her place of employment to go home by way of the bus stop aforementioned. Appellant stated that she customarily proceeded north on the west side of South Capitol Street until she reached the corner of South Capitol and Nichols Ave. from which point she would cross diagonally to the east sidewalk of South Capitol Street to the bus stop north of the bank property. On this night, because it was somewhat late and traffic was not heavy on South Capitol

Street at that time of night she crossed South Capitol Street from a point in front of premises 3921 where she was employed and proceeded north on the east sidewalk of South Capitol which carried her in front of the bank premises. She stated further when she stepped into the sidewalk area in front of the bank premises and had proceeded a few steps her foot was caught in the broken sidewalk in front of these premises and she was thrown to the ground and against some lumber which was lying on the ground to the right of the sidewalk. She suffered serious injuries as a result of this fall for which she filed her complaint, alleging that her injuries were brought about by the negligence of appellees in creating a dangerous condition through their servants and agents and in knowingly permitting a dangerous condition to exist without taking necessary precautions. Appellant and others testified that at nighttime the sidewalk in front of the bank premises was very dark because of insufficient lighting, the only light being a street corner light at the apex of South Capitol Street and Nichols Avenue.

Testimony indicated that the bank through its contractor and subcontractors had commenced excavation about the first of July 1952 and that numerous trucks drove on and over the sidewalk in front of the bank premises, unloaded as they drove on and loaded upon leaving and that this caused the sidewalk in front of the premises to become badly cracked and broken. Photographs were introduced in evidence showing the sidewalk north and south of the premises as being sound while the sidewalk in front of the premises was broken. Testimony was given that the sidewalk was the same in front of the bank premises as it was north and south of it prior to the commencement of construction but that the movement of heavy vehicles over the sidewalk in front of the bank premises caused the same to be broken. There was contradictory testimony tending to indicate that the sidewalk in front of the bank premises had been broken prior to commencement of construction.

Further evidence was introduced by appellant showing that at the time of the appellants fall there was in force a building regulation (page 26 of joint appendix, R.p. 69) requiring the owner of property in process of construction to sufficiently protect all neighboring property and take all necessary precautions for protection of life and limb, and this requirement was binding upon both the owner and his agent. Appellant introduced further evidence through Alexander Scott Offutt, president of the Bank, that Nebel was engaged by written agreement to erect a bank building for the Bank including excavating. The said witness further testified that the Bank engaged an architect, Leon Chatelain, Jr., by written agreement, who had the right and duty to supervise the job to be done by Nebel and his subcontractors (page 57 of joint appendix et seq.). Provisions of the contract with Nebel requiring Nebel to take precautions as well as provisions giving the Bank the right of supervision through its architect were admitted in evidence and are exhibits in the record (Exh. No. 8, Exhibits Number 8-A, Exhibit Number 8-B and 8-C for plaintiff) (page 58 of joint appendix).

There was further evidence introduced through the president of the Bank that he visited the Bank property on numerous occasions, both day and night, during the course of the excavation and construction from the commencement date around July 1, 1952, until long after the appellant suffered her injury. There was corroborating testimony substantially confirming the testimony of appellant that there were no safeguards to protect pedestrians using the broken sidewalk and that the lighting at night did not show the dangerous conditions while in turn there was testimony that there was adequate lighting. Photographs in evidence and the record on appeal give a fairly reasonable idea of the condition of the sidewalk in front of the Bank premises at the time of appellant's fall and there was no conflict in testimony that the sidewalk was so broken at the time of the said fall.

STATEMENT OF POINTS

At the conclusion of appellant's case counsel for appellees argued a motion for directed verdict upon the following grounds:

1. That since appellant and her witnesses did not identify the trucks which traveled on and off the sidewalk as belonging to either of the appellees and since they probably belonged to their subcontractors that under the law neither an owner nor a contractor was liable for the negligence of the contractor and subcontractor, respectively, and that therefore they are entitled to a directed verdict.

2. That the sidewalk is owned by the District of Columbia and the duty to repair is that of the District of Columbia and the appellees as owner of the adjacent property is not liable for injuries which take place thereon because of a defective condition of the same.

A general contractor and an owner is liable for their failure to take the necessary precautions to protect the public from foreseeable danger created by them or their agents or subcontractors. Directed verdicts should not be granted where there is a genuine issue of fact or where the undisputed facts can lead to different inferences. Fleming v. Fisk, 66 App. D.C. 350, 87 F.2d 747. Bell v. Brown, 76 U.S. App.D.C. 5, 128 F.2d 317.

Appellant responded to these points as are more specifically set forth in her argument herein after which the trial judge instructed the parties to return the following morning and instructed appellees to be prepared to proceed with the trial. On the following morning the trial judge announced that she was going to direct a verdict in favor of appellees and proceeded to so direct and entered judgment on such verdict. The trial judge refused to give a written opinion on the reason for such verdict and judgment or to give any reason for the record.

SUMMARY OF ARGUMENT

The evidence offered by the appellant was more than adequate to present an issue on several things which had to be submitted to the jury for a verdict. First, there was certainly sufficient evidence to show that an unsafe condition existed in front of the Bank premises and that the Bank and Nebel knew of this and did nothing to provide safeguards, proper lighting, warning or other precautions which the jury could have found that a reasonable prudent man would have taken to

protect users of the sidewalk. That even if the Bank and its general contractor were not liable for the negligence of its subcontractors, and the evidence did show that the trucks using the sidewalk caused its breaking but such trucks were not necessarily owned by the Bank or Nebel but did apparently belong to agents or subcontractors working on the job, they were so liable if they had supervision over the contractor's or subcontractors' work. That furthermore, the owner could be held liable under the requirement of the building regulation which specifically placed upon him and his agent the duty of taking the necessary precautions while in the course of construction on his property to protect neighboring property and life and limb of those using neighboring property. That further by contract obligation Nebel assumed the obligation to take necessary precautions which he failed to do. That finally, under the established law in this jurisdiction, even if an owner is not liable for the negligence of a subcontractor or a contractor, he is liable for his own negligence in failing to correct the defective condition once he becomes aware of the negligence of his contractor or his subcontractor. Here there was an admission by the president of the Bank that he visited the premises day and night during the entire construction and he knew or should have known of the dangerous condition of the sidewalk and the absence of safeguards, an issue which should have been submitted to the jury. Lastly, and separate from the other arguments herein presented, on the issue that the sidewalk was the sole responsibility of the District of Columbia who were the owners of the same, any person who damages the property of another is responsible to another injured thereby, particularly where a Municipal regulation placed certain obligations on such person anticipating such damage.

ARGUMENT

Appellant was injured in a fall on a sidewalk in front of the premises of the Appellee Bank which had been broken by vehicles driving over such sidewalk in the course of removing dirt from the property of the Bank

which was in the process of excavating and constructing a building thereon through Appellee Nebel and his subcontractors. It is conceded that the trucks and steam shovel which had broken the sidewalk were not shown to have belonged to the Bank or Nebel but were used in the construction job. It is also conceded that the sidewalk is owned by the District of Columbia and not the Bank which had the right to its use for ingress and egress to its property. There was adequate testimony and evidence to go to a jury that the sidewalk was broken by the aforesaid vehicles engaged on the job of the Bank and that there were no safeguards to adequately light the area at night, warn pedestrians of the dangerous condition of the sidewalk, or provided a safe walking space for them. There was sufficient evidence that appellees knew or should have known of these conditions and did nothing to remedy them. There is also no contradiction that at the time of the injury and during the construction work a Municipal building regulation was in force (page 26 in joint appendix) which placed certain requirements upon an owner and his agents engaged in construction as follows:

"Every portion of every structure in process of construction, alteration, repair, or removal, and all neighboring properties and structures, or any portion thereof, affected by such process, or by excavation, shall be sufficiently supported and protected by the building owner during such process; and all necessary precautions for protection of life and limb shall be taken by said building owner and his agent, who shall restore the adjoining owner and structures removed or damaged by him or them to as good a condition as they were immediately prior to his or their operations."

There was sufficient evidence that appellant fell on the broken sidewalk because she did not know it was badly broken and could not see its condition in the darkness and had no warning of the same.

There was further evidence and testimony that the Bank had a right of supervision of the entire job through its architect by agreement with the Contractor which agreement is one of the exhibits and included in the record on appeal and that by agreement the contractor, appellee

Nebel, undertook to take all necessary precautions to protect the owner, the property, and to take necessary precautions to protect others from injury by reason of the construction. Appellant refers this Honorable Court to her exhibits, and more particularly to the photographs showing the condition of the broken sidewalk, the steam shovel in operation, the references to the agreement between the Bank and its architect and between the Bank and Nebel.

The trial judge directed a verdict in favor of appellees on the above facts at the conclusion of the plaintiff's case on the apparent theory that the owner and general contractor are not liable for the negligence of the sub-contractors. This was erroneous not only because the facts and circumstances developed at the trial revealed liability as against both appellees on grounds of direct negligence by reason of direct misfeasance but also by reason of the applicability of the exception to the rule that an owner or contractor is not liable for the negligence of a subcontractor.

Direct negligence and liability thereunder. Both appellees are liable for the injuries suffered by the appellant if a jury decides that inadequate precautions had been taken to protect pedestrians in the use of the sidewalk by reason of their violation of the Municipal regulation requiring them to take the necessary precaution for protection of life and limb by protecting neighboring property (adjacent sidewalk) while in the course of doing excavating on the Bank's property. The Bank is directly liable for the injury suffered by appellant under the law established in the case of Bailey v. Zlotnick, 80 App. D.C. 117, 149 F. 2d 505 wherein this Court ruled that an owner is liable for harm caused by unsafe condition of the premises which results from the contractor's negligence. Under the theory in Bailey v. Zlotnick the negligence of the Bank and Nebel as well is not from their negligence in breaking the sidewalk but in knowingly permitting the condition to exist without taking the necessary precautions to properly light the area and warn persons using the sidewalk of the dangerous condition. The

negligence consists of the condition caused by or resulting from the negligence of the subcontractor and not from the negligence of the subcontractor in breaking the sidewalk. The argument that this condition existed on District of Columbia property and was therefore the obligation of the District of Columbia Government is overcome by the requirements of the building regulation aforesaid creating an obligation on the owner and his agents and on the general liability of anyone using another's property to use it with proper precaution to the safety of third parties. Ross v. Hartman, 78 U.S. Appeals D.C. 217, 139 F. 2d 14.

There is an additional ground for holding both appellees liable directly and that is if the work undertaken by the owner and turned over to a contractor and subcontractors necessarily creates a nuisance, not only is the original employer liable for an injury resulting therefrom but the contractor may also be, although the actual work is done by an independent subcontractor. Chicago v. Robbins 2 U.S. 418, 2 U.S. 418 (Black) 14 L.E. 427, Baumeister v. Markham 101 Ky. 122, 39 S.W. 844, 41 S.W. 816. American Jurisprudence Volume 27, page 523, Section 46, elaborates on the liability of an abutting property owner who causes an excavation or an obstruction to be made in or near a public highway:

"An abutting owner who causes an excavation or obstruction to be made in or near a public highway in front of his premises in such a manner that injury to a traveler will result unless precautions are taken cannot let the work to an independent contractor and escape liability if such contractor fail to take the necessary precautions. Even if the use of the highway during construction is authorized it is a work which is intrinsically dangerous to travelers unless guards and lights are maintained; and if an injury results from the absence of such protections, the liability of the abutting property owner may be placed on the intrinsic danger of the work."

In Thomas v. Harrington 72 N.H. 45, 54 Atlantic 285 it was held that a property owner could not relieve himself from liability for injury to a traveler

upon the highway as a result of the negligent failure to guard and light after dark, a trench opened in the highway to connect owner's dwelling with street water main by employing independent contractor. In like manner the breaking and permitting the existence of a badly broken sidewalk without adequate warning, protections, and proper lighting at night by an adjacent property owner through his agents and directly, brought about by construction on his property, is such a nuisance and dangerous condition as to place it within the argument presented by the foregoing authorities, the difference in the dangerous condition being that of degree and an issue for a jury.

Exception to the rule that owner cannot be held for negligence of contractor or subcontractor. In this case the owner reserved the right of supervision of the entire job, including excavation, through his architect by written agreement (note exhibits) and actually did supervise the entire job. Not only was such supervision of the work but also of the operation of the job. Not only could the Bank have demanded the necessary safeguards and lighting over the broken sidewalks from the contractor and subcontractors under its contract (note exhibits) but in his supervision the architect knew or should have known of the dangerous condition existing on the sidewalk in front of the Bank premises during excavation and the Bank could have insisted through such architect that appropriate precautions be taken. In failing to do this while having supervision the Bank became liable for the resulting injury to the appellant. In Haw v. Liberty Mutual Ins. Co. 86 App. D. C., 180 F. 2d 18 this Court held the owner liable under the doctrine of respondeat superior because the owner exercised a measure of supervisory control. In this case by agreement (note exhibit) the Bank retained a measure of supervisory control through its architect who had the authority to demand compliance with the agreement as per plans and specifications which included taking precautions to protect adjacent property and against dangerous conditions and if the Bank did not avail itself of this right it was liable for the

acts of the subcontractors, contractors and its own acts which resulted in injury to others.

Liability under its agreement. Lastly, both appellees were liable by virtue of the agreement of the Nebel Company (note exhibit) to protect the owner and to take precautions against such conditions and the failure and neglect of the owner to avail himself of the protection afforded him under such agreement by either demanding that the contractor and subcontractors take the necessary precautions to prevent injury on the defective sidewalks of which condition the Bank was fully aware by the admission of its president and of which condition the contractor should have been aware because of the long period of time the said condition existed. The Bank, under its agreement, had the right to correct or remedy the dangerous condition and charge the cost to the contractor but the evidence does not show that either the Bank or the Nebel Company did anything about a known dangerous condition which finally resulted in injury to the appellant.

CONCLUSION

It is respectfully submitted that the foregoing authorities and reasoning support the contention of the appellant that the evidence presented in this case should have been passed upon by a jury on the various matters which created an issue of fact and that the trial court was in error in directing a verdict for the appellees and that the judgment of the United States District Court for the District of Columbia should be reversed with directions to grant a new trial.

Respectfully submitted,

MILTON M. BURKE

1010 Vermont Ave., N. W.
Washington 5, D. C.

Attorney for Appellant

(i)

INDEX

PLEADINGS AND DOCUMENTARY EVIDENCE:	Record Page	Appendix Page
Complaint	238	2
Answer of Defendant Joseph F. Nebel	241	4
Answer of Defendant Anacostia National Bank	244	5
Verdict and Judgment	255	7
Notice of Appeal	256	7
EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS:		
Witnesses		
Sudie Merriam		
Direct	3	8
Cross	28	14
Cross (By Mr. Yochelson)	44	19
Redirect	63	25
John L. Mack		
Direct	67	25
Marjorie Anna Cliver		
Direct	92	26
Cross	109	34
Redirect	126	38
Louise Scanland Smith		
Direct	129	39
Cross	134	42
Hans E. Blum		
Direct	141	43
Cross	152	45
Caroline M. Blum		
Direct	164	50
Cross	170	53
Howard Augustine Merriam		
Direct	180	55
Cross	188	56
Alexander Scott Offutt		
Direct	188	56
Cross	203	62
Redirect	211	65
Recross	231	70

JOINT APPENDIX

PLEADINGS AND DOCUMENTARY EVIDENCE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

238 [Filed July 16, 1953]

Sudie Phipps [Merriam])
1629 F Street, N. E.)
Washington, D. C.)

Plaintiff)

vs.)

Anacostia National Bank,)
a corporation doing business)
in the District of Columbia)
2000 Nichols Avenue, S. E.)
Washington, D. C.)

and)

Joseph F. Nebel)
T/A Joseph F. Nebel Company)
2140 P Street, N. W.)
Washington, D. C.)

and)

E. P. Knollman)
8155 Connecticut Avenue)
Paul E. Knollman)
3278 Aberfoyle Place, N. W.)
Thomas Ritchie Edmonston)
8155 Connecticut Avenue,)
All doing business as)
E. P. Knollman Company)

Defendants)

Civil Action No. 3248-53

COMPLAINT

(Damages Suffered in Fall on Defective Premises)

1. Jurisdiction is vested in this Court pursuant to the provisions of the Code of Laws for the District of Columbia, the amount claimed being a sum in excess of Three Thousand Dollars.

2. The plaintiff is a citizen of the United States and a resident of the District of Columbia and files this suit to recover damages she suffered as a result of being caused to fall in front of the premises of the new South Capitol Street branch of the Anacostia National Bank as a result of the maintenance of a defective condition in front of the premises whereon the bank building was constructed. The defendant, the Anacostia National Bank, is the owner of the premises on South Capitol Street in the District of Columbia diagonally across the street from premises 3921, and was such owner on to wit the 17th day of July, 1952, at which time the defendant, the Anacostia National Bank, a corporation doing business in the
239 District of Columbia, was in the process by and through the defendant, the Joseph F. Nebel Company, and the defendants, owners of the E. P. Knollman Company, of constructing a new bank building on the said premises. The Joseph F. Nebel Company owned by the defendant, Joseph F. Nebel, was on the 17th day of July, 1952, a contractor in the process of doing certain construction for the defendant, the Anacostia National Bank, engaged in the construction of a branch bank for the defendant on South Capitol Street diagonally across the street from premises 3921. The defendants, E. P. Knollman, Paul E. Knollman and Thomas Ritchie Edmonston, all co-partners, trading as E. P. Knollman Company, engaged in the construction and excavating business, and on July 17, 1952, were engaged in excavating work either as agent of the defendant, Joseph F. Nebel, or the Anacostia National Bank or both, in the process of excavating the ground for the construction of the new branch of the Anacostia National Bank on South Capitol Street in the District of Columbia.

3. On and prior to July 17, 1952, while in the course of doing excavating work and other work leading towards the construction of a bank building for the defendant, the Anacostia National Bank, the defendants, by and through their various agents and employees, and by means of the vehicles and equipment which they used in the course of their work, did carelessly, negligently, and recklessly cause the sidewalk in front of the bank premises to become damaged, depressed, and broken in various places and permitted that condition to remain without warning, lighting, or any other notice of the danger thus created. That by reason of the maintenance of the aforesaid defective conditions by the defendants, aforesaid, the plaintiff, who was lawfully at that time and place, July 17, 1952, using the said sidewalk and unaware, because of the darkness, of the defective condition, was caused to and did fall upon the said damaged sidewalk, and as a result of such fall, suffered serious and possibly permanent injuries to her person. That because of the aforesaid fall and the injuries suffered by the plaintiff, and due to the negligence of the defendants and each of them, the plaintiff was caused to incur extensive medical bills, loss of considerable earnings by loss of her time from her employment and suffered various other losses and expenses. That in addition to the aforesaid losses and expenses, the plaintiff suffered serious pain, agony and mental anguish and was confined to a hospital and to her home for a considerable period of time and received painful and extensive

240 medical treatment, all to her damage in the full sum of Fifteen Thousand (\$15,000) Dollars.

WHEREFORE, the plaintiff prays for judgment against the defendants and each of them both jointly and severally in the full sum of \$15,000 together with costs.

/s/ Milton M. Burke

Attorney for plaintiff * * *

JURY DEMAND

Plaintiff demands a trial by jury.

/s/ Milton M. Burke

Attorney for plaintiff

241 [Filed July 31, 1953]

ANSWER OF DEFENDANT JOSEPH F. NEBEL

First Defense

The Complaint fails to state a cause of action entitling the Plaintiff to relief.

Second Defense

1. This Defendant admits that the Defendant, Anacostia National Bank, was on July 17, 1952, the owner of premises on South Capitol Street and that on July 17, 1952, construction work had commenced on said lot looking toward the construction of a bank building. This Defendant further admits that he was the general contractor for this undertaking and that the Co-Defendants, E. P. Knollman, Paul E. Knollman Thomas R. Edmonston, trading as E. P. Knollman Company, were concrete and
242 excavation sub-contractors.

2. This Defendant is without knowledge or information sufficient to form a belief as to whether the Plaintiff sustained a fall on July 17, 1952 on the sidewalk in front of the premises where the bank building was undergoing construction. This Defendant is further without knowledge or information sufficient to form a belief as to the injuries and damages, if any, sustained by the Plaintiff.

3. This Defendant denies that the sidewalk aforesaid was damaged, depressed or broken in various places by reason of any negligence on his part or the part of his agents, servants, employees or independent contractors.

4. This Defendant denies each and every other allegation of the Complaint not herein expressly answered.

Third Defense

The injuries and damages, if any, sustained by the Plaintiff resulted solely from the negligence and carelessness of the District of Columbia and unknown third parties.

Fourth Defense

The injuries, if any, sustained by the Plaintiff resulted from the contributory negligence and carelessness of the Plaintiff at the time and place alleged.

Fifth Defense

The Plaintiff assumed the risk of any injuries and damages sustained by her.

HOGAN & HARTSON

/s/ Paul R. Connolly

Attorneys for Defendant

Joseph F. Nebel * * *

243

[CERTIFICATE OF SERVICE]

244

[Filed August 7, 1953]

ANSWER OF DEFENDANT ANACOSTIA NATIONAL BANK

The defendant, Anacostia National Bank, a body corporate organized under the laws of the United States, for answer to the complaint filed herein respectfully states as follows:

First Defense

The complaint fails to state a cause of action entitling the plaintiff to relief.

Second Defense

1. Defendant admits that it is the owner of certain real estate located on South Capitol Street in the City of Washington, District of Columbia, and on which premises it is now in process of having erected a bank building. It alleges that the construction of such building is being done under a contract with the defendant Joseph F. Nebel Company; and, that in the course of construction the said Joseph F. Nebel, as general

contractor, has entered into subcontract with various individuals and concerns among whom are the defendants E. P. Knollman Company.

245 2. This defendant denies that a negligence, lack of care or diligence on its part or on the part of any of its agents, servants, or employees, was responsible for or in any wise contributed to any injuries that may have been sustained by the plaintiff. It denies specifically that it, or its agents, servants or employees, did cause a defective condition to exist or be maintained on the sidewalk in front of the bank premises.

3. This defendant denies that the plaintiff was injured by reason of any act or conduct, failure or omission whatsoever of this defendant, its agents, servants or employees.

4. This defendant denies each and every other allegation of the complaint not herein specifically answered.

Third Defense

The injuries and damages, if any, sustained by the plaintiff resulted solely from the negligence and carelessness of the District of Columbia and unknown third parties.

Fourth Defense

The injuries, if any, sustained by the plaintiff resulted from the contributory negligence and carelessness of the plaintiff at the time and place alleged.

Fifth Defense

The plaintiff assumed the risk of any injuries and damages sustained by her.

GROSSBERG, YOCHELSON &
BRILL

By /s/ Irving B. Yochelson
Attorneys for Defendant * * *

255

[Filed April 18, 1956]

VERDICT AND JUDGMENT

This cause having come on for hearing on the 13th day of April, 1956, before the Court and a jury of good and lawful persons of this district, to wit:

[List of Jurors]

who, after having been duly sworn to well and truly try the issues between Sudie Phipps Merriam, plaintiff and Anacostia National Bank, a corporation doing business in the District of Columbia and Joseph F. Nebel t/a Joseph F. Nebel Company, defendants and after this cause is heard and given to the jury in charge, they upon their oath say this 18th day of April, 1956, that they find for the defendants against said plaintiff by direction of the Court.

WHEREFORE, it is adjudged that said plaintiff take nothing by this action, that said defendants go hence without day, be for nothing held and recover of plaintiff their costs of defense.

HARRY M. HULL, Clerk

By /s/ Anne W. Lyddane
Deputy Clerk

By direction of

Judge Burnita Shelton Matthews

256

[Filed May 17, 1956]

NOTICE OF APPEAL

Notice is hereby given this 17th day of May, 1956, that Sudie Phipps Merriam hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 18th day of April, 1956 in favor of The Anacostia National Bank and Joseph F. Nebel Company by direction of Court against said Plaintiff.

/s/ Milton M. Burke
Attorney for Plaintiff * * *

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1

[Filed July 31, 1956]**Washington, D.C.****April 13, 1956**

The above-entitled matter came on for trial before the HONORABLE
BURNITA S. MATTHEWS, A United States Judge, and a jury, at 1:30 p.m.

APPEARANCES:**For the Plaintiff:**

**MILTON M. BURKE, ESQ., and
BERNARD ROWITZ, ESQ.**

For the Defendants:

**IRVING B. YOCHELSON, ESQ.
Representing Defendant Anacostia
National Bank.**

**FRANK F. ROBERSON, ESQ.,
Representing Defendant Joseph F.
Nebel Company.**

* * * * *

3

SUDIE MERRIAM

the Plaintiff, having been first duly sworn, * * *

DIRECT EXAMINATION**BY MR. BURKE:**

**Q. Mrs. Merriam, would you state your full name? A. Sudie C.
Merriam.**

**Q. Where do you live? A. I live at 3717 Rhode Island Avenue, in
Brentwood, Maryland.**

**Q. Mrs. Merriam, I call your attention to July 17, 1952, what was
your name then? A. Sudie Phipps.**

**Q. Since that time you have been married to Mr. Merriam, is that
correct? A. Yes, sir.**

**Q. And at that time where did you live? A. 1629 F Street,
Northeast.**

Q. And where were you employed then? A. At the Atlantic Beauty Salon, 3921 South Capitol Street, Southeast.

4 Q. Now, Mrs. Merriam, on what side of South Capital Street would that be located, was it the east or west side of South Capital? A. I am not certain of those directions but I think it would be on the west side.

Q. Would that be the side opposite the side the bank building was built on? A. Yes, sir.

Q. About how far from the location of that bank building was the shop where you were employed? A. Practically a good block.

Q. How long had you been working at the Atlantic Beauty Shop prior to the time you were injured in front of the bank location? A. I think I went to work there in March, the same year.

Q. March of the same -- when? A. Of the same year, 1952.

Q. And how did you go home when you went home? A. By bus.

THE COURT: How?

THE WITNESS: By bus.

BY MR. BURKE:

Q. Where was the bus stop located? A. On the northern side, past where the bank is, on the same side of the sidewalk where the bank building is now. It is about half a block from the northern end
5 of that building on that street to the bus stop.

Q. It is about a half block north of the bank building? A. Yes, sir.

Q. And was that the same location of the bus stop in July of 1952 when you were injured? A. Yes, sir.

Q. When you went to that bus stop, how did you normally go to it? On which side of the street did you normally walk? A. Most of the time there was a triangular intersection there. And most of the time, there are no street lights right across, there weren't at that time.

MR. ROBERSON: If it please the Court, that is not responsive. She was asked how she usually walks, not what color the street lights are.

THE COURT: Just answer the question that is asked. Don't

volunteer any information except as it is responsive to the question.

THE WITNESS: Most of the time I walked up to the corner of this triangular fork of the road on the same side of the street that I worked on and crossed from that corner and walked to the bus stop.

Sometime the traffic, in case the traffic was heavy or light I cross below there in front of the shops and walked up the street to the
6 bus stop on the opposite side.

BY MR. BURKE:

Q. Now, prior to the time that they had commenced work on the construction of the bank building on South Capital Street, had you used the east sidewalk of South Capital Street? **A.** Yes, sir, several times.

Q. And had you observed the condition of the sidewalk when you used it on those occasions? **A.** Yes, sir. It was all right.

* * * * *

Q. Would you tell us as you observed it, what was the condition of the sidewalk prior to the time that the construction commenced? **A.** Good.

7 **Q.** Did you observe any breaks at all in the sidewalk? **A.** No, sir I did not.

Q. Now, when was the first time that you observed any defects in the sidewalk? **A.** Shortly after they started excavating in this area and taking trucks in and out over that sidewalk.

Q. Were you able to see the bank premises from where you were employed at the Beauty Shop? **A.** You could see that, yes, sir.

Q. And could you see any vehicles coming on and off those premises? **A.** Yes, sir.

Q. Did you see any? **A.** Yes, sir.

Q. And during what period was that? **A.** Well, it was, I think that started there along in June of 1950, the latter part of June in 1952 and right on through the months that followed.

Q. Do you know about when that job commenced? **A.** I think that it was in June, the latter part of June, 1952.

Q. And you were injured at what date? A. I fell on July 7, 1952.

8 Q. Now, calling your attention then to July 17, Mrs. Merriam, how late did you work at the shop? A. The night I fell, I worked until 9:30. It was 9:30 when I left the shop, in the evening.

Q. And about what time was it? You say it was 9:30 when you left the shop? A. Yes, sir.

Q. Was it light or dark at that time? A. It was dark.

Q. Now you started telling us something about lighting. Were there any lights on the east side of South Capital Street in that area? A. No, sir, not at that time.

Q. Were there any lights on the west side of South Capital Street, on the side where the beauty shop was situated, where you work? A. One on the very corner where the forks of the roads were.

Q. Did that light cast sufficient light to light up the east sidewalk? A. No, sir, it didn't.

Q. Now then, how did you go to the bus stop on July 17 on that night? A. I crossed just a short distance from where I came out of the beauty salon, crossed the street and walked up the street to the bus stop.

9 Q. Why did you cross the street this time to go to the bus stop, when you had told us that most of the time you went on the other side of the street? Was there any reason for it? A. Well, at that hour that night there was not very many cars coming along right at that time and I had a good chance to cross the street.

Q. Customarily is there a lot of traffic on that street? A. Yes, sir.

Q. At that time that you go home, and for that reason you walked to the corner? A. Yes, sir.

Q. Now then as you proceeded, after you crossed the street, you went directly toward the bus stop, is that correct? A. Yes, sir.

Q. And that would be going north on South Capital Street? A. Yes, sir.

Q. When you arrived in front of the bank building, what was the condition of lighting? A. There wasn't any.

Q. Could you observe the sidewalk at that particular time? A. No, sir.

Q. And what happened as you walked in front of the premises? Would you tell the Court and Jury? A. My right foot went down in a broken place
10 in the sidewalk and I fell on my right side and fell into some lumber that was laying against the fence and partly on the sidewalk at the time.

Q. Mrs. Merriam, I show you Plaintiff's exhibit No. 2, and ask you if you recognize the location shown by that photograph?

THE COURT: Is your answer yes or no?

THE WITNESS: Yes, sir.

BY MR. BURKE:

Q. Can you mark for us with a pencil the spot where you fell? A. Yes, sir, I can.

Q. Will you do that? A. (The witness marked the exhibit as instructed.)

Q. You have indicated here then, Mrs. Merriam, the spot where you fell on the sidewalk in front of the bank premises by a black pen mark? A. Yes, sir.

MR. BURKE: Your Honor, I would like to pass that around.

THE COURT: May I see it, please?

MR. BURKE: Yes, your Honor. (Handing exhibit to Court.)

THE COURT: You may pass it now to the jury.

(Plaintiff's Exhibit 2 was passed to the Jury.)

MR. ROBERSON: Which photograph is that?

11 THE COURT: No. 2.

MR. BURKE: That is Plaintiff's No. 2.

BY MR. BURKE:

Q. Now then I show you these other photographs, Mrs. Merriam, and ask you whether--

THE COURT: Mr. Burke, while it is agreed that some of these photographs would be admitted without formal approval, I do not believe you have formally offered them. They are looking at No. 2. No. 2 is admitted.

(Plaintiff's Exhibit No. 2
was received in evidence.)

MR. BURKE: I would like to offer, your Honor, Nos. 1, 2, 3, 4 and 5 of the Plaintiff's Exhibits in evidence.

THE COURT: That will be 1 through 5 admitted.

(Plaintiff's Exhibits 1, 3, 4,
and 5 are recieved in evidence.)

BY MR. BURKE:

Q. Mrs. Merriam, I show you these exhibits 1, 3, 4 and 5 and you have already seen plaintiff's No. 2. Would you look at those photographs.

Mrs. Merriam, was that the condition of the sidewalk in front of the bank premises at the time that you fell? A. Yes, sir.

Q. Now then, did you have occasion to come back to the sidewalk within a short time after you fell and observe that sidewalk? A. Yes, sir.

13 MR. ROBERSON: Your Honor, I object to this unless he is going to tie it in by showing that all of this sidewalk was put in at the same time. I don't know whether it is or not. There is no inference. If so, it is irrelevant. Up at the bus stop or down by the beauty parlor. What we are concerned with is the condition in front of the bank building and comparing it with some other sidewalk is immaterial and I think it is collateral.

MR. BURKE: If counsel will let me go on, I may satisfy him on that.

MR. ROBERSON: I am objecting now. He hasn't made any effort to show that the sidewalk was put down at the same time. Whether it was subjected to the same or different amount of use.

THE COURT: The objection will be overruled at this time subject to his making an appropriate showing.

BY MR. BURKE:

Q. Now then, Mrs. Merriam, prior to the time that construction commenced on these premises, was the condition in front of the bank

building of the sidewalk in front of the bank building identical to the sidewalk on July 29, north and south of those premises? A. Yes, sir.

14 Q. Mrs. Merriam, in these photographs, you observe a frame hut and a chicken wire fence. Do you recall when this hut and fence were put up? A. Not the exact date.

Q. Do you recall approximately how long before you were hurt? A. I don't think it had been up there very long when I had fallen. I don't think that was erected there until they had done quite a bit of excavating in there.

Q. So when their vehicles were coming on and off the sidewalk from that location, did they go in that direction? A. Before that was put up they went in and out, across anywhere in front of that area.

Q. In other words, that chicken fence wasn't there and the cars were coming across the sidewalk?

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CROSS EXAMINATION

BY MR. ROBERSON:

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Q. Did you observe any cracks in the sidewalk before your fall at all? A. No, sir, I didn't.

Q. Then you thought everything was perfectly smooth along there the night that you were going there and you were going home to catch your bus, is that right? A. That is right.

Q. And none of this area that we see, none of these cracks, had been in that sidewalk when this construction started, is that your testimony? A. No, sir.

Q. What is your testimony, what do you say the condition was? A. I mean no, sir, those breaks were not there until they started the construction.

Q. How recently had you gone over this particular area in front of the bank site before your fall? How many weeks had passed? A. Well, I do not know exactly, sir. It probably had been three or four weeks

since I had crossed and walked up on that side of the sidewalk.

29 Q. Well, the construction work had been going on less than three weeks, the excavation work at the time of your fall, hadn't it? A. I don't know approximately what time. I think it started there in late June.

Q. Well, and you fell on the 17th of July? A. That would be less than --

Q. Is it your testimony that you had not walked along this sidewalk from the time the construction was commenced until the time that you fell? A. No, sir, I had not.

Q. No, sir, you had not? A. No, I had not.

Q. And your place of business was a block away and across the street? A. Yes, sir.

Q. And South Capital is a wide street there? A. Yes, sir.

Q. And you couldn't see the condition of that sidewalk from looking out of the window of your beauty salon? A. You could not observe that area to really tell from that distance.

Q. And you couldn't tell whether the subcontractor doing the excavating was crossing on boards or by the sidewalk or what he was crossing on, could you? A. Well, from walking up on the other side
30 to get the bus I never observed, or getting off the bus and walking on the other side of the street when I went in during the day, I never saw any boards lying on the sidewalk for trucks to pass over.

Q. My question was from the window of your shop you weren't close enough to see whether they were crossing over on boards or not? A. I think you could observe boards on the sidewalk.

Q. On this deposition that I had taken less than a month ago, didn't I ask you this question:

"Q You don't know whether there was a break in the curb or whether they put boards up over the curb across the sidewalk in order to enter?

"A No, sir, I don't know that."

That is what you told me in the deposition in March 16? A. Yes, sir,

but you was referring to the sidewalk not the curb. You couldn't see if they had put it on the curb at the window.

Q. You don't know whether there was a break in the curb or whether they put boards up over the curb and across the sidewalk in order to enter? A. No, I don't know that.

* * * * *

36 Q. And how far into the broken area did you proceed before you fell? A. Well, I think, sir, I must have been in the broken area four to five feet at least.

Q. About how many steps, can you give it to us in steps? A. Well, I would say maybe six or eight steps.

Q. You had taken six or eight steps in a roughened area, and then is when you stepped into this place and turned your ankle? A. Yes, sir.

Q. You could feel the roughness under your foot, could you? A. Yes, sir, I could.

* * * * *

37 Q. Were you in a hurry to catch a bus that night? A. No, I wasn't particularly in a hurry because I could see the bus from there, if it had been coming, I could have seen it.

Q. Well, you told me on this deposition that you were in a hurry. Remember on page eleven, didn't I ask you this:

"Q Tell us what happened on that particular night, July 17, 1952.

"A Well, I think I fell there around nine o'clock. It was between 9:30 and 10 o'clock. I had been kept a little late at the shop that night. I hadn't finished by nine-o'clock and I was in a hurry to get home, or get up to the bus so I won't miss it." That is what you said on your deposition, isn't it? A. Yes, sir, I did say that.

* * * * *

38 Q. It being very dark and you feeling it rough, you proceeded on whether you could see the ground or not, is that right? A. Yes, sir, I walked on.

Q. The tenants of the apartment immediately to the north of this bank project had been using it as a parking area for many months before construction started, hadn't they? A. I don't know that, sir. I never saw any cars parked in there.

Q. You don't know one way or the other, then? A. No, sir, I don't.

* * * * *

39 Q. You didn't see any signs on this property prior to the time of your fall saying Nebel Company, did you? A. You mean before I fell?

Q. That is right. A. Well, there was some big signs up there before I fell on the property. Yes, sir, but that sign said "Nollan Company."

40 Q. Did you remember seeing that on the side of that shack?

A. I don't remember distinctly the names on those things but I think both names were on different things, on that property. There was writing on the trucks and on the big sign.

Q. You don't know what writing was on the trucks, whose names were on the trucks, do you? A. No, sir, I don't I don't remember ever reading the lettering on those trucks.

Q. But don't you recall that there was a sign there on the shack saying "Nollan and Company"? A. Yes, sir. I am quite sure there must have been on there but --

Q. Not "must have been," but you know it, don't you? Don't you know that you saw that there? A. Yes, sir, I saw a sign there.

Q. You saw a sign reading "Nollan and Company," didn't you? A. Yes, sir, I did and I think there was one reading--the other firm's name you have just mentioned, too.

Q. You think so, but can you tell us where it was? A. I think both of those names were on the big sign that was up there on that property, about the construction of the building.

41 Q. Do you know what was on the side of the steam shovel that was operating on the property? A. No, sir, I don't know.

Q. And you can't tell us what the sign was on any of the trucks

that you say crossed into that property? A. No, sir, I can't.

Q. The excavation work on this property was still going on. Hadn't been completed as of the date of your fall, had it? A. No, sir, it hadn't been completed at that time.

Q. And the concrete work hadn't been started on the bank, the bank building. The concrete work hadn't been started. They were just clearing the property, isn't that right, and leveling it? A. I don't think any building had started at that time of my fall.

Q. Now, Mrs. Merriam, can you tell me of anyone that can testify to the condition of that sidewalk when the construction work began? A. Can I tell you of anyone that can testify?

Q. Yes, you say you had observed that it was an old sidewalk, you thought it was in good condition. Can you tell me any person with no interest in this lawsuit that could testify about the condition of that sidewalk before the construction began? A. Well, I have witnesses that
42 lived in that area that has used that sidewalk for many years.

Q. Who is that? A. Mr. Bloom and Mrs. Bloom.

Q. Mrs. Bloom is one of your customers at your hair shop?

A. Yes, sir, I have done her hair for a long time.

Q. You are no longer with the Beauty Salon? A. No, sir.

Q. Where are you now? A. I am at the Myrtle Beauty Salon on Pennsylvania Avenue Southeast.

Q. And does Mrs. Bloom come over to the Myrtle Salon and you do her hair there, also? A. Yes, sir.

Q. Do you know anything else that knows about the condition of the sidewalk? A. Well, yes, sir, Mrs. Louise Smith lives in that area.

Q. Is she another old customer of yours? A. Not so very old.

Q. I am not referring to her age but the length of time that you have personally waited on her and taken care of her hair. A. I wouldn't call her a very old customer.

43 Q. You waited on her at the Atlantic Beauty Salon? A. Yes, sir.

Q. And she has also followed you over to this Myrtle Beauty Salon?

A. Yes, sir.

Q. Do you know anybody else that can testify about the condition of that sidewalk before construction began? A. I think Mrs. Clifford can testify as to the sidewalk. Her house adjoins that property at the back.

Q. Mrs. Marjory Clifford? A. Yes, sir.

Q. At the time you worked at the Atlantic Beauty Salon, she worked there, too? A. Yes, sir.

Q. Later on she became the owner? A. Yes, sir, she owns it now.

* * * * *

Q. You were fellow-workers then at the time that Marjory Clifford was there? A. Yes, sir, we were both employed by Mrs. Hyde.

Q. Do you know anybody else that knows about the condition of that sidewalk? A. Not personally, no.

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44

CROSS EXAMINATION

BY MR. YOCHELSON:

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MR. YOCHELSON: Mr. Burke, it is stipulated, is it not, that the sidewalk is public property and not the bank property?

MR. BURKE: I don't know whether it is or not.

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MR. BURKE: It was stipulated that the accident occurred on the public sidewalk in front of the building. Whether that belongs to the adjacent property owner or not, I do not know.

MR. YOCHELSON: When stipulated that that was public property, is that any qualification?

MR. BURKE: I think the adjacent property owner has no interest in that sidewalk.

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MR. BURKE: The stipulation is that the accident occurred on the public sidewalk in front of the building project and that is true.

MR. YOCHELSON: As a matter of law, I assume that the public sidewalk is publicly-owned sidewalk and not owned by the adjacent property owners.

THE COURT: I would understand that something is a public sidewalk is the sidewalk of the District of Columbia.

MR. BURKE: I will be glad to give my opinion on it, your Honor, if that is what counsel wants.

MR. YOCHELSON: I only want to know the effect of the stipulation.

MR. BURKE: The stipulation speaks for itself, but I know this, your Honor, that part of a person's front yard and their sidewalk is all public property and it is public in so far as the District might want to use it but other than the District, the adjacent property owner has a right to certain privileges to it as against everyone else in the whole world.

Now there is that kind of a qualification on all adjacent property but I don't think that is the purpose that counsel wanted us to enter into the stipulation. I think the purpose was that the District customarily takes care of public sidewalks. I did stipulate that the accident took place on a public sidewalk.

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A. I saw the trucks going in and out when I had a chance to look out the window.

Q. Were these large trucks or small trucks? **A.** Dump trucks.

Q. How large? **A.** Well, an average dump truck. I don't know the feet or size of them.

Q. Did you pay particular attention to them? **A.** I just saw them going in and out. I didn't pay really any particular attention to them.

Q. You had no personal interest in the job other than seeing them, you can't tell much about them? **A.** No, I had no personal interest in the job over there.

Q. You were not a sidewalk superintendent, you never came over and watched the diggers dig? **A.** No, sir, I didn't.

Q. What color were these trucks? **A.** That I don't know.

47 Q. How many of them did you see? A. Oh, there were lots of them. I have seen as many as two or three at a time. One loading and one going in and out from a distance.

Q. Were they trucks with multiple wheels in the back, more than one wheel in the back? A. That I don't know either. I never observed them that close.

Q. You watched them come in empty, and did you also watch them go out loaded? A. I have seen them go in there empty and I have seen them come out full of dirt.

Q. And when you say full of dirt, you mean that they had a customary large amount of dirt on them? A. You could see the dirt over the bedding of the truck.

Q. At any time during the course of these excavations, did you cross over to the other side of the street where the bank was being built and examine what was going on? A. No, sir, I never went over to look at the place.

Q. Did you go over there for any reason? Did you ever go over to the Giant next door? A. Yes, sir, we used to go to the store and get things for sandwiches and go to get bakery things for our lunches at the beauty shop.

48 Q. When he went there did you see the trucks crossing the sidewalk? A. There is a curve. When you got to the store, I don't think you could see that lot.

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Washington, D. C.,

Monday, April 16, 1956.

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FURTHER CROSS EXAMINATION

BY MR. YOCHELSON:

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Q. At any rate, both the fence and the shack were there on the date of your fall? A. Yes, sir.

Q. Can you tell us how much prior to the date of your fall they were there? A. Well, I don't think they were up there very long, maybe a week, maybe not quite a week, sir.

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Q. Would that be your best judgment, about a week? A. Yes, sir, to the best of my judgment.

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Q. Mrs. Merriam, I now show you Plaintiff's Exhibit No. 3, and I ask you if the roughened section of the sidewalk shown in that picture is the same section as is shown in Plaintiff's Exhibit No. 2, which the jury has just seen and on which you placed your "X" mark? A. Yes, sir, I think it is. It shows further toward the north end of the street.

* * * * *

Q. Mrs. Merriam, would it be possible for you to indicate by an "X" mark on Plaintiff's Exhibit 3 the place on which you fell? A. Well, it doesn't show it as plain as this one does, but --

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Q. Now, Mrs. Merriam, as you look at this photograph from the bottom to the top you are looking from the south to the north; are you not? A. Yes, sir.

Q. And as you look to the upper left you are looking across the grass adjoining the sidewalk, between the sidewalk and the curb and the street; is that not true? A. Yes, sir.

Q. Now, Mrs. Merriam, would not heavy trucks loaded with dirt,

such as you saw coming in and out of that excavation, make ruts in a grass plot? A. Well, I think it would depend on how dry the earth was at the time they crossed it, whether it was wet, had rained, or if it was dry and very hard.

Q. Would the grass be crushed if the trucks went over it? A. I think they would crush it some, yes, sir.

Q. Now, can you indicate on this picture any marks of trucks or crushed grass at the place where you say you fell? A. I don't think it looks nearly as smooth as it does a little farther up the street, sir. It does look like it might have been smashed and crushed some there.

59 Q. You think that that grass plot opposite the "X" shows that wheels from heavy trucks had gone over it? A. Well, it looks to me like that it has been mashed.

Q. Do you see any tire marks? A. No, sir, I can't see any tire marks.

MR. YOCHELSON: If the Court please, may I show Plaintiff's Exhibit No. 3 to the jury?

THE COURT: Yes.

(Plaintiff's Exhibit No. 3 is shown to the jury.)

MR. YOCHELSON: The "X" on the photograph, members of the jury, is placed where the plaintiff indicates she has fallen.

This (indicating) is the grass plot between the sidewalk and this (indicating) is the street from which trucks would have had to pass to come this way (indicating).

BY MR. YOCHELSON:

Q. Mrs. Merriam, I should like to inquire from you with respect to the locations of street lights at the time of your fall. Where was the nearest street light to that place? A. There is a picture there that I can show you if I may, sir.

Q. Yes, you can if you would like to. A. The closest street light was across here on this little -- in here (indicating) where the filling station --

60 Q. May we put a mark here? Would this be accurate then?

A. Well, it is down a little farther than this picture shows. It was some --

Q. How much farther? A. I don't remember, sir, just in feet but I know that it isn't that close to that corner, but that is the closest -- the street light across the street on that corner.

* * * * *

Q. Well, there is nothing between the light and the bank, other than the street? A. Nothing but the road, sir.

61 Q. And that is true at the time you fell? This light was just across the street from where you fell? A. Yes, sir.

Q. Do you know whether the light was lit on that night? A. I don't remember, sir, if it was on or not. I know it was quite dark going by there. That filling station some nights was open and some nights it was closed.

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Q. Actually, Mrs. Merriam, you didn't see any trucks cross this sidewalk, did you? A. Yes, sir, I saw trucks cross over that sidewalk.

Q. I didn't say cross; I said crush. A. Well, I don't remember ever seeing them actually break it. I wasn't ever that close to them as they went in and out from there, to tell that.

Q. How far were you? A. Well, as a general rule, if I went by there going to work at noontime and they were working there, I would cross the street right above where those trucks were coming in and out.

Q. Can you give us some estimate in feet how close you were to the trucks? A. I would say right at the north end of the lot, about the edge of that first apartment building there.

62 Well, you still haven't given us any estimate in feet. The jury can't tell how far that is. A. I think it would be about 100 feet, sir.

Q. That you were about 100 feet from the trucks as you saw them going in? A. Yes, sir.

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REDIRECT EXAMINATION

BY MR. BURKE:

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Q. Mrs. Merriam, would you describe to us how that happened?

A. Well, I was walking up the street going home from work and I had just taken a few steps, and where the sidewalk felt rough, when my foot went down into a hole, my right foot, and that threw me to my right side.

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Q. And this "X" mark on Plaintiff's Exhibit Number 2 fairly accurately depicts the place where you fell? A. Yes, sir.

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67

JOHN L. MACK* * *
DIRECT EXAMINATION

BY MR. BURKE:

Q. Mr. Mack, would you state your name in full? A. John L. Mack.

Q. Where do you live? A. 1786 Forty-first Place, Southeast.

Q. Mr. Mack, you are connected with the District of Columbia Government; are you not? A. I am.

Q. In what capacity? A. As a plan examiner is the title.

Q. As what? A. Plan examiner.

Q. With what department is that? A. Department of Licenses and Inspections.

Q. And how long have you been thus engaged? A. Since 1920.

Q. In that capacity, sir, did you have occasion to apply the building code of the District of Columbia to construction in the District of Columbia? A. Various phases of it, yes, sir.

68

Q. Are you familiar, sir, with Article 307-02, Section 308, of the building code? A. Well, I will have to see what it is.

MR. ROBERSON: May we approach the bench, Your Honor?

(After conference at bench, examination was resumed as follows:)

BY MR. BURKE:

Q. Mr. Mack, I have referred you to Article 307-02, Section 308, of the building code. I think it is on page 144. Am I right? Section 308.

THE COURT: I think it would be well for you to look at the regulation, Mr. Burke, to see if it is the one you had in mind.

BY MR. BURKE:

Q. That is the one. A. 307-02.

Q. 308. A. 308.

Q. Mr. Mack, was that regulation, that section, in force on July 17, 1952? A. Yes, sir, it was.

Q. And is it in force today, sir? A. Yes, sir.

Q. Would you read that regulation? A. Yes.

69

"Every portion of every structure in process of construction, alteration, repair, or removal, and all neighboring properties and structures, or any portion thereof, affected by such process, or by excavation, shall be sufficiently supported and protected by the building owner during such process; and all necessary precautions for protection of life and limb shall be taken by said building owner and his agent, who shall restore the adjoining owner and structures removed or damaged by him or them to as good a condition as they were immediately prior to his or their operations."

Q. Mr. Mack, you said, "restore the adjoining owner." You mean, "the adjoining property;" isn't that right, sir? A. "Shall restore the adjoining property and structure," yes.

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MARJORIE ANNA CLIVER* * *
DIRECT EXAMINATION

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BY MR. BURKE:

Q. Mrs. Cliver, would you state your name in full? A. Marjorie Anna Cliver.

Q. Where do you live, Mrs. Cliver? A. 3861 Halley Terrace, Southeast.

Q. Is that the same place you lived in July of 1952? A. Yes, sir.

Q. Where are you employed? A. At the Atlantic Beauty Salon on South Capitol Street.

Q. You presently own that beauty salon, do you not? A. Yes, sir.

Q. I call your attention to July 17th of 1952, Mrs. Cliver. Were you then employed at the Atlantic Beauty Salon? A. Yes, sir.

Q. Was Mrs. Sudie Merriam, who was then Mrs. Sudie Phipps, employed there with you as a co-employee? A. Yes, sir.

Q. Mrs. Cliver, in relationship to East Capitol Street -- I mean South Capitol Street, and the location of the Anacostia National Bank there, where is your house located? A. Well, the back of the Anacostia

93 Bank and the back of my house -- my house is a good thirty feet higher than the back of the Anacostia Bank. I can look on the roof of it. We are back to back.

Q. What is the elevation of your house as compared to the street, South Capitol Street, in front of the bank? A. There is a thirty-foot -- I think it is a thirty-foot wall behind the Anacostia Bank and that is just about two feet higher than the back of my yard.

Q. So your house sits above the site of the Anacostia National Bank? A. Yes, sir.

Q. Now, during July of 1952 or thereabouts, did you have occasion to take photographs of the construction job of the Anacostia National Bank building? A. Yes, sir. After the middle of July, I had occasion.

Q. I show you this photograph and ask you whether this is one of the photographs which you had taken? A. Well, I didn't take this photograph myself. This particular one was taken by, I think, the Anacostia -- the president of the Anacostia Bank.

Q. Is that the gentleman who is sitting here, Mr. Offutt? A. I heard that that was who took it.

94 Q. Now, then, Mrs. Cliver, directing your attention to that photograph, do you see your home in that photograph? A. Yes, sir, I see my kitchen door.

Q. And was the construction job of the Anacostia National Bank at the completion or during the excavation work as that photograph depicts it? A. It isn't completed but they are excavating it.

Q. And about when was that? A. I suppose they got that far in August. I don't know the exact --

Q. That was in 1952? A. Yes, sir.

MR. BURKE: I want to show this to counsel.

MR. ROBERSON: Your Honor, I submit the photograph does not show the sidewalk, which is the only thing we are interested in. I think that will be objected to as irrelevant.

MR. BURKE: Your Honor, I want to introduce this photograph for only one purpose.

Will the Clerk please mark this Plaintiff's Exhibit No. 7, for identification.

(Thereupon, photograph was marked as Plaintiff's Exhibit No. 7, for identification.)

THE COURT: That has been marked for identification.

MR. BURKE: I want to introduce it, Your Honor, for the purpose of showing the location of Mrs. Cliver's house in relation to the Anacostia National Bank construction job and its height.

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* * * *

Q. Mrs. Cliver, I want to ask you on directing your attention to Plaintiff's Exhibit No. 7, a photograph, whether that little white house on that photograph is your house? A. Yes, sir.

Q. And that construction job is the construction of the Anacostia National Bank during the period of excavation? A. Yes, sir.

MR. BURKE: I would like to pass that to the jury.

96

THE COURT: Very well, it is admitted.

(Thereupon, photograph previously marked Plaintiff's Exhibit No. 7, for identification, was received in evidence.)

BY MR. BURKE:

Q. Now, then, Mrs. Cliver, how long had you been living at that house prior to July 17, 1952? A. Since August 1, 1935.

Q. And during that time, Mrs. Cliver, had you had occasion to use the sidewalk in front of the premises where the Anacostia National Bank was being constructed? A. Yes, sir, we had a foot path from the back. We had no fence. It was all open ground and wooded, so we had a foot path and I used to come down there and made it a short-cut to get out to the street.

THE COURT: Where would start in on this foot path?

THE WITNESS: Well, I could come right out -- now, there is a fence around my property -- I could come right out on the north end of my lot and come straight ahead of me from the back of my yard and just walk straight ahead.

THE COURT: You mean you would walk over this area, this ground, where the Anacostia National Bank now has its building?

97

THE WITNESS: Yes, ma'am.

THE COURT: Go ahead.

BY MR. BURKE:

Q. And you would come out where on the sidewalk in relation to the Anacostia Bank property? A. Right by the side of that apartment house 3848.

Q. That would be north of the property? A. Yes, I think so.

Q. Now, then, did you observe during those occasions the condition of the sidewalk in front of the bank property and at both ends of it?

A. Yes, sir.

Q. And what was the condition of that sidewalk?

THE COURT: Mr. Burke, I think you better fix the time. The last date she mentioned was 1935.

MR. BURKE: Very well.

BY MR. BURKE:

Q. Mrs. Cliver, when did that construction job first commence, that is the construction of the Anacostia National Bank? By commence, I mean the excavation work. A. Well, they started clearing it on July 1, 1952.

Q. Now, prior to July 1, 1952, had you had occasion to use the sidewalk in front of the premises, beyond it and on both extremities of it.

A. Yes, sir.

98 Q. How soon before that was the last time that you used it?

A. Well, I used it right up until the time they started the work and then I couldn't any more.

Q. And what was the condition of the sidewalk prior to the time that they commenced this excavation? A. It was all right. There was nothing wrong with it.

Q. What was the condition of the sidewalk in front of the bank premises as compared with the condition on both ends of it? A. It was all right. It was just a two-block sidewalk.

* * * * *

BY MR. BURKE:

Q. Now, did you continue to use the sidewalk after that job commenced? A. I didn't have a lot of occasions to use it, no, sir. Unless I was going down town and wanted to catch a bus quicker, then I would walk up past the job to catch the bus.

Q. Well, did you have occasion to observe the sidewalk after the job commenced operating? A. Yes, sir.

99 Q. And what was the condition, then, of the sidewalk in front of the premises after the job had commenced and was progressing?

* * * * *

BY MR. BURKE:

Q. Between July 1, 1952, and July 17, 1952? A. Well, as I said before, if I was going downtown and I was off on Wednesdays and the bus wasn't coming up to the stop in front of the grocery store, I could pass that site and catch it in front of the apartment house. There I had two ways of catching a bus.

Q. Well, did you observe the sidewalk during that period? A. Yes, sir, I had been over it.

Q. And what did you observe as to the condition of the sidewalk in

front of the bank premises? A. Well, they were running trucks over the sidewalk and breaking it up, and they were also dropping little

100 pieces of dirt that would drop off of the truck.

Q. Were you able to see the egress and ingress of trucks and any other dirt-moving vehicles from the back of your house? A. Yes, sir.

Q. And how often could you see that during the time that the job was progressing? A. Well the back of my house is the kitchen and it was warm so the kitchen door was open, and I could see it every time I passed the kitchen door or the window.

Q. And did you observe from July 1, 1952, until July 17, 1952, or during that period vehicles moving on and off the project? A. Yes, sir.

Q. Can you describe those vehicles to us? A. Well, as far as I know -- I mean, I saw they were just trucks that hauled dirt.

Q. Did you observe a steam shovel on the premises? A. Yes, sir.

Q. Now, how did that steam shovel get on there, if you know?

A. I don't know. That came on when I was either in bed or wasn't paying any attention.

Q. Were there any bulldozers? Do you know what a bulldozer is?

A. Yes, sir.

101 Q. Were there any bulldozers operating on the job during that period? A. I believe there were because they were pushing the dirt around, you know, kind of out of the way.

Q. Did you actually see any of the bulldozers come over the sidewalk? A. No, sir.

Q. But you did see them in operation on the land? A. Yes, sir.

* * * * *

102 Q. What time in the morning did you usually go to work? A. I had to be there at 9:00 -- I usually got there a quarter of.

Q. How long did it take you to get there? A. Well, through the short cut, about five minutes.

Q. So that you wouldn't leave your house until twenty minutes of nine as a rule? A. That is right.

Q. And up to that time did you look out through the back window of your kitchen and see what took place on that property or on the sidewalk? A. Yes, sir, I walked to the end of my yard and watched.

Q. What time did you usually get up? A. Around 6:00.

Q. Did you spend a considerable amount of time in your kitchen, Mrs. Cliver? A. Well, working -- I went to work at 9:00 until 1:00 o'clock, and then I came back home, and then I went back about 4:30 or 5:00 and worked until 9:00 three days a week.

Q. And during the times you were home, did you at all times have occasion to look at sometime or other out through your back window?

A. Yes, sir, I made it a point to go and watch them.

Q. And did you ever see anyone sweeping that sidewalk? A. No, sir.

103 Q. Mrs. Cliver, were there any vehicles parked, prior to the construction undertaking, on the bank property?

MR. YOCHELSON: I object. I submit it has no materiality to anything here.

MR. BURKE: You made an opening statement referring to it.

MR. YOCHELSON: I withdraw the objection.

THE COURT: It seems to me that in the interest of saving time, that you should have some limit or some time limit on the question that you are putting.

MR. BURKE: I won't be very long, Your Honor.

THE WITNESS: Yes, sir.

BY MR. BURKE:

Q. Were there many vehicles there? A. Never more than four.

Q. When did they first start using that ground for parking?

A. Well, it was a year, I will say -- now, it could have been eleven months, and it could have been thirteen months. It wasn't very long.

Q. And how did they get onto that property? A. They had a driveway.

Q. Where was that driveway located? A. Well, it was just about there the one is now for the bank when they leave the bank.

104 Q. Well, we don't have any picture of that here, so would you describe it by saying the north end or south end or central of the property?

A. I think it was the north end.

Q. The north end of the property? A. Yes.

Q. About how wide was that, would you say? A. Well, I will say it was about three feet wider than a car, than an automobile.

Q. Now, the cars that parked there, were they cars belonging to the public or were they cars that belonged to the people next door?

A. They were cars belonging to the people in the apartment house.

Q. And did you have occasion to observe the driveway during the time that they were using it? A. Oh, yes, I walked right by it.

Q. Was there anything wrong with the sidewalk where those cars came onto the property? A. The driveway and the sidewalk was all right and part of the driveway -- the land wasn't even, it sort of sloped up. After you passed the driveway and the pavement walk, there was another piece of cement there belonging to the driveway that was all right. Then they must have put the cement sort of on the dirt and didn't do it too good, so that part was a little broken because it was thin.

105 Q. That was on the property itself? A. Yes, sir.

Q. And what was the condition of the sidewalk itself? A. That was all right.

Q. And was it in the same condition up to the time that they commenced their project? A. Yes, sir.

MR. BURKE: May I have the first five exhibits?

BY MR. BURKE:

Q. I show you Plaintiff's Exhibit No. 3, Mrs. Cliver, would you examine that. Now, do you observe the sidewalk at the top of the photograph -- that would be towards the north side of the sidewalk or of the bank property -- do you see the condition of the sidewalk north of the bank property? A. That is up here by this driveway -- up here by this little driveway?

Q. That is right. A. Yes, sir.

Q. Now, you also see the broken part of the sidewalk, do you not?

A. Yes, sir.

Q. Now, can you tell me in relation to the appearance of the sidewalk north of the property whether the sidewalk that is broken was in the same condition before the job was commenced or was worse?

106 A. Before it was commenced?

Q. Before the job was commenced. A. No, before it was commenced it wasn't broken.

Q. The sidewalk was the same all the way? A. Yes, sir.

Q. And did the same condition prevail south of the broken sidewalk?

A. No, sir, that sidewalk was -- you mean after this broken part down further?

Q. That is right. A. Yes, sir, the sidewalk was all right.

Q. All the way? A. Yes, sir.

Q. Do you know the street? A. Yes, sir.

Q. Including the premises in front of the property? A. Yes, sir.

Q. Mrs. Cliver, you worked with Mrs. Merriam in the shop at the time that she was hurt on July 17, 1952? A. Yes, sir.

Q. Do you recall seeing her on July 18th? A. Yes, sir.

* * * * *

109

CROSS EXAMINATION

BY MR. YOCHELSON:

Q. You are not unfriendly with Mrs. Merriam because she works for another beauty parlor, are you? A. No, sir.

* * * * *

110

Q. Friendly co-workers? A. Yes, sir, we got along.

Q. You were certainly friendlier with her than you were with the Anacostia Bank. Didn't you sue the bank for \$9,000 because a tree of yours was torn down or you claimed a tree of yours was torn down in the course of the construction of the bank building? A. You want me to tell you about that?

Q. Just answer, did you or didn't you? A. Yes, but not because a tree was falling down.

Q. So that you felt rather mad at the bank? A. No, sir, I am not mad at them. I do business with them.

Q. Now, Mrs. Cliver, is it your testimony that the sidewalk as shown in the picture that was presented to you got that way between July 1st and July 17th? A. Yes, sir.

Q. And all of the damage to the sidewalk shown there occurred in that seventeen-day period? A. Yes, sir.

Q. You testified that excavation started or the clearing started on July 1st? A. Yes, sir.

111 Q. When was the first day that trucks came in? A. I couldn't tell you; they came in while I was at work.

Q. You saw them coming, didn't you? A. I saw them after they were there. Yes, sir.

Q. Do you know what date they came in? A. No, sir.

Q. How many days were spent clearing the lot? A. I couldn't tell you.

Q. More than a day? A. I imagine so, yes.

Q. Don't you know? A. No, sir.

Q. Would you say that you used to go every morning to your back fence and look down and see what was going on? A. I was watching them because I put up a new fence and they had permission to dig into a fifteen-foot alley, and I was asking Mr. Walton Terrell, who I knew personally, not to come too close because that was a new fence.

Q. You went every day to see that your fence wasn't damaged; isn't that true? A. Not every day, but I did go down and watch them, yes.

Q. And you can't tell us how long it was after they started clearing before they completed clearing? A. No, sir.

112 Q. Do you know how many days before July 17th it was that trucks first came in? A. No, sir, I couldn't tell you.

* * * * *

114 Q. Well, you say they started clearing July 1st? A. Yes, sir.

Q. How do you remember that day so well? A. Because the 4th of July was a holiday and I didn't have all that noise.

Q. You mean they weren't working on the 4th of July? A. That is right.

Q. Were these sheds there on the 4th of July? A. I don't think so.

Q. Well, when were they there? A. They may have been working on them, but I don't think they were up the 4th of July.

Q. Weren't the sheds moved there already completed? A. I couldn't say.

Q. You don't know much about the sheds and you don't know much about the fence, do you? A. I didn't pay -- after they started clearing, I didn't go down the foot path any more. I told you that the only time I
115 passed was when I was going to town, to catch the bus, after they started construction.

Q. Well, how many times did you do that? A. I couldn't say.

Q. More than once? A. Oh, I imagine so.

Q. Don't you know? A. No, I don't know how many times I went down town.

* * * * *

Q. On how many separate distinct days did you see trucks there? A. Well, actually as long as they had the trucks there I saw them practically every day they were there.

Q. Well, you haven't answered my question, Mrs. Cliver. How many days did you see them there? A. I couldn't say. I saw them from the time they brought them in until they got through carrying the dirt out.

Q. Well, you aren't helping the jury at all, they don't know how many days that was. I would like you to try to help them; can't you?

116 A. I can't help them.

Q. All right, what kind of trucks were they? A. Just dirt trucks.

Q. Do you remember what color they were? A. No, I do not.

Q. Do you remember whether they had any names on them?

A. No, I do not.

* * * * *

118 Q. And I take it those are the only places you saw the trucks come in and go out -- come in the north end and go out the south end?

A. Yes.

Q. Mrs. Cliver, when you saw those trucks go out the south end of the lot, did you notice whether or not there were planks or boards on the sidewalk? A. No, sir, there weren't.

119 * * * * *

Q. At any time did you see any boards or planks across the sidewalk? A. Yes, sir.

Q. You say you did see them? A. Yes, sir.

Q. When did you see them? A. After I called over there and talked to Mr. Terrell.

Q. Whom did you talk to? A. Mr. Walton Terrell.

Q. Who is he? A. He was one of the construction men on the job.

Q. And when did you talk to him? A. I talked to him the day Miss Phipps came to the shop and was hurt.

Q. That was on July 18th? A. Yes, sir.

* * * * *

123 Q. And how long was she away from work? A. Altogether?

Q. Yes. A. I don't know.

Q. Give your best estimate. A. I couldn't say.

Q. You have no idea whatsoever? A. Well, she didn't work any more that week.

* * * * *

124 CROSS EXAMINATION (contd)

BY MR. ROBERSON:

Q. Mrs. Cliver, how many apartment units did they have in 3848 South Capitol Street, that apartment immediately north of the bank property? A. I don't know.

Q. Were there as many as eight or ten? A. Yes, sir, I would say at least eight.

Q. Well, didn't all of those tenants park cars up there on the lot?

A. No, sir, not all of them had cars.

Q. Did any of them have as much as two cars? A. No, sir, not to my knowledge.

Q. In addition to parking their cars on that lot, some of the tenants also had gardens on it; didn't they? A. Yes, sir.

* * * * *

125 Q. * * * Mrs. Cliver, when did you file your law suit against the bank? A. Sometime in August.

MR. BURKE: Just a moment. I object to that, Your Honor. I don't see the materiality of that.

MR. ROBERSON: It shows her bias.

THE COURT: The objection is overruled.

BY MR. ROBERSON:

Q. Answer the question. When did you file suit? A. I think in August.

Q. 1952? A. Yes, sir.

* * * * *

126 REDIRECT EXAMINATION

BY MR. BURKE:

Q. Mrs. Cliver, I think you testified that you are a depositor with the Anacostia National Bank as of this date, are you not? A. Yes, sir.

Q. Have you had any disagreements or arguments with either Mr. Offutt, the president of the bank, or any of his staff? A. No, sir.

Q. As a matter of fact, the photograph which was introduced in evidence was given to you by Mr. Offutt, was it not?

* * * * *

127 Q. You were satisfied on the difficulty you had with the subject of your suit with the bank, were you not? A. Yes, sir.

Q. You testified that trucks came in on the driveway on the north end of the lot and came out at the edge of the fence. What method, if any, did they use before that fence was put up? A. Well, they just came in and drove out.

Q. Was there any special place? A. No, sir.

* * *
LOUISE SCANLAND SMITH* * *
DIRECT EXAMINATION

129

BY MR. BURKE:

Q. Mrs. Smith, would you state your name, please? A. Louise Scanland Smith.

Q. Where do you live, Mrs. Smith? A. 4530 Livingston Road, Southeast, Apartment 3.

Q. Where did you live on July 17th, 1952? A. 4530 Livingston Road, Southeast.

Q. Now, Mrs. Smith, I call your attention to the premises where the Anacostia National Bank was constructed. Do you remember the ground prior to the time that the bank was constructed? A. Yes, I do.

Q. Did you have occasion to observe that area and walk past there prior to July 1st of 1952? A. Yes.

Q. How long a period of time prior to that date had you had occasion to be in that area past those premises? A. Since May of 1951 when I moved out.

Q. That was when you first commenced to live at this address. A. Yes.

130

Q. What was the reason for your passing through that area? A. I went to the Post Office, which is three blocks up the street, and I used to walk down to go to that Giant Store, which is just past -- which is past where the bank is now.

Q. Mrs. Smith, were you familiar with the east sidewalk of South Capitol Street in front of the Anacostia Bank property and on both extremes of it? A. Yes.

Q. And were you likewise familiar with that sidewalk prior to the time that the Anacostia National Bank commenced the construction of its building there? A. Yes.

Q. I show you these two photographs, Plaintiff's Exhibits 2 and 3. Would you examine them, Mrs. Smith, and familiarize yourself with them.

Now, Mrs. Smith, prior to July 1 of 1952, or prior to the time that the Anacostia National Bank commenced its construction or excavation, what was the condition of the sidewalk in front of its premises, if you know?

A. It was unbroken.

131 Q. Mrs. Smith, I call your attention to Plaintiff's Exhibit 3 -- if you look at the back of the book there, you will see which one it is -- and I ask you if you note the sidewalk beyond the bank property and the sidewalk in front of the bank property. What was the condition of the sidewalk in front of the bank property as compared to the condition beyond the bank property immediately prior to the commencement of the construction? A. The sidewalk in front of the bank property was unbroken, smooth, as this appears to be beyond it here.

Q. It was similar to the one beyond it? A. Yes.

Q. Now, calling your attention to the condition of the sidewalk on the south side of the bank, that is on the sidewalk south of the bank property, what was the condition of the sidewalk as compared to the sidewalk on the north side? A. It was also smooth and unbroken.

Q. So that the whole sidewalk was smooth and unbroken? A. That is correct.

Q. When did you first observe the sidewalk in front of the bank property showed signs of breaking or was broken? A. I cannot answer that exactly.

Q. Well, compare it to the date when they first commenced construction. A. It was sometime in the summer. I know that the weather was hot. It was the summer of 1952, and --

132 Q. And at that time, was construction going on? A. Yes.

Q. Had there been any building put up there or was it merely in the excavation stage? A. I do not think that a building was up at the time that I first noticed it.

Q. Do you know Mrs. Merriam, formerly Mrs. Phipps?

A. Yes, I do.

Q. You have been to the beauty parlor where she works, have you not, on some occasions? A. Yes.

Q. Do you remember when she was injured in a fall? A. Yes, I do.

Q. Do you remember when that was? A. I don't know the exact date, but I do know it was hot weather -- summertime.

Q. Now, calling your attention again to the broken sidewalk, was that sidewalk broken prior to the time she was hurt or after the time she was hurt? A. It was broken before.

Q. Now, Mrs. Smith, had you in the course of time that you passed in front or near that bank property seen any trucks or vehicles driving over that sidewalk and onto the project? A. Yes, I had

133 Q. And about how many occasions was that? A. Well, I don't know, but I -- positively -- five or six, anyway.

Q. Was that before Mrs. Merriam was hurt or after Mrs. Merriam was hurt? A. Well, that was before, when they first began.

Q. Now, I show you Plaintiff's Exhibit No. 4 and I ask you whether, at the time that you saw those vehicles coming on and off that property, that fence was erected? Had that fence been erected as yet? I am referring to the wire fence, whatever type of wire it is. A. To the best of my knowledge, no.

Q. Then, on what part of that property did the vehicles come upon the bank property? A. About the center -- but I'm not sure because I wouldn't have any way to determine which, before the bank was put up, was the bank property.

Q. Well, I'm referring to the property where the excavation was going on? A. So far as I know, it was right in the center or close to the center.

Q. Had you ever gone by there, prior to the time that Mrs. Merriam was injured, at night time? A. I don't believe so.

134 Q. You had or had not? A. I had not, to the best of my knowledge, at night.

Q. Did you ever see any boards put over the sidewalk prior to the time that Mrs. Merriam was injured? A. No.

CROSS EXAMINATION**BY MR. YOCHELSON:**

Q. Mrs. Smith, did Mrs. Merriam give you that pretty hairdo you have today? A. Yes.

MR. YOCHELSON: I have no other questions.

CROSS EXAMINATION (Continued)**BY MR. ROBERSON:**

Q. How long have you been a customer of Mrs. Merriam's?

A. Since she first came to Anacostia Beauty Shop and that was, I believe, in the late summer of 1951 -- I am not positive -- it has been a good while ago.

Q. Is the Anacostia Beauty Shop the same or a different one than the Atlantic? A. Excuse me, I mean the Atlantic.

Q. You became a customer of hers when she came to that shop; is that right? A. That is right.

* * * * *

135 Q. When did Mrs. Merriam cease to do work at Atlantic Beauty Salon? A. I do not remember the date.

Q. In any event, you followed her on over to this new shop that she went to work for; didn't you? A. That is right.

Q. Where is that? A. Sixth and Pennsylvania Avenue, Southeast, or near there -- not right on the corner.

Q. That is much more distant from your home than the Atlantic Beauty Salon, isn't it? A. That is right.

Q. And you make that extra trip because you like her -- like the way she does your hair? A. That is correct.

136 Q. What was the date that Mrs. Merriam was injured? A. I do not know.

Q. When did you find out about it? A. The next time that I went to the beauty shop and she was not there.

* * * * *

139 Q. Can you answer my question as to whether you can definitely say whether it was between the 1st and the 17th of July that you first noticed any area in that sidewalk in front of the bank?

* * * * *

140 THE WITNESS: No.

BY MR. ROBERSON:

Q. In other words, you are not definite about the time you first noticed it; is that correct? A. Yes.

* * * * *

HANS E. BLUM* * *

141 BY MR. BURKE:

Q. Mr. Blum, will you state your name, sir? A. Hans. E. Blum.

* * * * *

142 Q. Now, then, both from your address on South Capitol Street and from your address on Nichols Avenue, did you have occasion to use the east sidewalk of South Capitol Street in front of and near where the
143 Anacostia National Bank building is located? A. Yes, indeed.

* * * * *

144 Q. Did there come a time, sir, when you saw actual work going on -- actual digging? A. Most likely there was, but I would not swear to that under oath because my occasion to pass there was generally in the evening when I came from work. I was riding from work from Bolling Field up to the triangle where that filling station is and generally got off the car there and went over to the shopping center to do whatever shopping we needed, and then walked on home from there. And that way -- of course, at that time of the evening, there was no construction work going on.

Q. Could you observe from what you saw as you passed that property whether there had been any work done on it? A. Oh, there was digging going on there first and later on, building.

Q. Now, then, prior to the time that they commenced that digging, did you observe the sidewalk in front of the bank building as to whether or not it was broken or whether it was sound? A. The sidewalk was

what you would call normal condition, the same as the rest of the sidewalk in that block.

Q. In other words, the whole sidewalk was in about the same condition? A. More or less, I would say, yes.

145 Q. Did there come a time when you noticed that the sidewalk in front of the bank became different than the condition of the sidewalk beyond and below and above it? A. Oh, as soon as they started doing the digging, and sidewalk in front of where digging was going on was deteriorating very rapidly and became more or less of a hazard to such an extent that it formed a topic of discussion going to the store -- "My, it is getting terrible here" -- you could almost break your neck as you went by there.

* * * * *

Q. Now, did you walk over the broken part of the sidewalk at any time in the evening? A. Oh, yes, certainly.

Q. And can you tell us, sir, whether there were any lights directed against this sidewalk from this property or from any direction? A. Now, I couldn't tell you just how late in the evening it was. You must remember this is in June or July, or late spring or early summer that we are talking about and it doesn't get dark until late, so I couldn't be a judge -- I wouldn't -- this is too far back for me to remember if I ever walked -- what time of the day I walked there. Generally my walking was done while it was still daylight.

* * * * *

146 Q. Let me ask you, sir, do you know Mrs. Merriam, the plaintiff in this case? A. Yes, I do know her.

* * * * *

148 Q. When was the first time that you heard of her fall, Mr. Blum? A. Mrs. Blum --

THE COURT: What he wants to know is the time.

THE WITNESS: That is what I am trying to bring out. Mrs. Blum is a customer -- is one of Mrs. Merriam's customers. Mrs. Merriam has done her hair dressing and -- has for years long before she moved

out there -- I found out, naturally, in a matter of conversation between Mrs. Blum and I. She said, "Well, I went down to get to make an appointment and called Sudie for an appointment" --

* * * * *

149 Q. Mr. Blum, I think you have some photographs there. I direct you to Plaintiff's Exhibits No. 2 and 3. Do you observe the mesh wire fence in those photographs? A. Yes, I see a fence there.

Q. When they first started building on that bank property, Mr. Blum, if you know, was this mesh wire fence there then? A. As I recall it, they started digging before they put up the fence but I couldn't -- I can't place dates. That is four years back. I never expected to be called to testify on anything of this sort.

* * * * *

CROSS EXAMINATION

BY MR. YOCHELSON:

* * * * *

152 Q. Well, did you discuss it? Did you talk about it? A. I discussed it with Mr. Burke -- not here today. This was the first time that he contacted me. He said, "You live in that neighborhood?" I said "Yes." He said, "Could you remember as far back as when the bank was built, how the sidewalk was?" And I said, "Well, the sidewalk I could tell you that it was getting pretty dilapidated during the construction work before there was anything done about it, even any warning sign there. Mrs. Blum and I discussed it amongst ourselves walking up and down the neighborhood. But as to construction, I couldn't tell you anything about dates. All I can tell you is -- not even what was the season of the year. That is what I am referring to.

* * * * *

154 Q. Did you at any time actually see trucks going in and out of this construction job? A. No.

* * * * *

155 Q. Didn't you say the sidewalk was not covered at the time she fell? A. It was not covered when I walked across it.

Sir, the sidewalk was not covered at first during the early part of construction or digging when I walked on it. I didn't say anything about the sidewalk being covered or uncovered for the moving of equipment. It couldn't have been very well covered if it was beat up from the equipment.

Q. When you went by there at night, you say that the sidewalk was not covered? A. Not at first, no, sir.

Q. You mean it was covered at night later? A. Yes, before the construction work was finished, the sidewalk -- there were planks laying across it.

Q. At night? A. Sometimes there were and sometimes there weren't.

* * * * *

156 Q. Would you say that on some occasion after work had stopped, you saw planks on the sidewalk? A. Not when they were digging at first, not for a long time.

Q. When did you see them there? A. When they were building down there.

Q. You mean when the digging was already completed? A. I don't know just how -- just when. I don't know when they started digging and when they laid the first brick or what the borderline is between construction and digging.

Q. Tell me, please, sir, where on the sidewalk you saw the planks.

157 A. They were laying parallel with the sidewalk. In other words, they were -- if this is the sidewalk, they were laying in the direction with the sidewalk, not across.

Q. If this is the sidewalk, they were running this way (indicating). Is that the idea; or running this way? A. Which are you pointing now? Which was the sidewalk?

Q. This (indicating) is the sidewalk running north and south.

A. The planks run north and south.

Q. The sidewalk runs north and south; does it not? A. Yes, just like I pointed out, they were laying parallel with the sidewalk.

Q. And they ran north and south too? A. I beg your pardon.

Q. They ran north and south, the same as the sidewalk? A. As far as I remember, yes.

Q. Now, where with reference to the bank lot did you see the planks; were they near the north end, south end, or in the middle?

A. I would say that they were nearer the south end of the lot than the north end, if I was to determine the location.

Q. Was there a driveway where you saw them? A. No, there was no driveway there. You had to jump the curb or go over the curb to get on the sidewalk or get off the sidewalk, whichever way they went.

158 Q. Was there a sidewalk on the north end of the lot, or rather a driveway on the north end of the lot? A. I wouldn't particularly call it a driveway. I don't think there were any -- there was -- it was an empty lot and I don't think there were any curb stones at the north end of the lot, but the --

Q. Was there a curb cut? A. But the vehicles -- at the north end -- both ends of the lot were beat up, but I think the south end was beat up more than the north end.

Q. What do you mean by both ends of the lot were beat up?
A. I mean the entire length in front of the construction except the south end of the sidewalk -- the south end of the sidewalk, the sidewalk near the south end, was beat up worse than the sidewalk on the north end.

Q. But the entire sidewalk in front of the entire bank construction job was all beat up? A. Eventually, before they all got through, it was beat up pretty darn bad.

Q. Was it beat up bad enough for you to make a report of it to the District of Columbia or the police? A. I mind my own business.

Q. The answer is you made no report to anyone? A. No, sir.

* * * * *

159 BY MR. ROBERSON:

Q. Mr. Blum, ten days after the construction started, was the sidewalk smooth in front of the bank property? A. How many days?

Q. Ten days. A. I couldn't tell you that, sir.

Q. You couldn't tell me whether it was or was not smooth ten days after it started? A. I couldn't tell you that, sir, because I don't know the date it started and I don't know -- four years back, I could not

160 possibly remember but I know the sidewalk got worse from day to day. From the time we first noticed digging going on, it deteriorated very rapidly; and I know that from my own experience because I walked across it, sir.

Q. You didn't fall down, did you? A. No, sir, I didn't; I was watching my step too.

Q. You watched your step when you went by? A. I had to, very closely, because it was hazardous.

Q. Just listen to my question for a minute.

You can't tell us the date when the construction and digging started; can you? A. No, sir.

Q. You can't tell us the date? There was a date when you first noticed it though; wasn't there? A. Sure there was a date I first noticed it because before I noticed it being bad, it was good.

Q. Now, my question is ten days after you first noticed any digging, was the sidewalk smooth in front of the lot? A. I couldn't tell you that. I can't mention any -- I am not attempting to fix any days or dates or anything; it is impossible for me to fix any dates. I would make a liar out of myself if I tried to after four years back, saying what happened then as to dates -- one day --

THE COURT: Mr. Blum, when a question is put to you, just answer the question, if you can; if you can not, just say you can not but do not follow up with a lot of information that has not been asked for.

161

BY MR. ROBERSON:

Q. Mr. Blum, does your testimony come to this: you don't know whether it was one week, two weeks, or ten weeks after the digging began that you first noticed the sidewalk becoming bad? A. No, that is not my testimony, sir.

Q. Well, how soon was it that you first noticed it? A. I told you almost immediately as soon as we noticed it, because it was getting bad as soon as they started digging.

Q. Was it within the first ten days? A. I would definitely say so, yes.

* * * * *

Q. You referred to Mrs. Merriam as both a friend and business acquaintance of your wife; is that correct? A. An acquaintance of my wife, yes, sir; not my own.

162 Q. Was your wife in business? A. No, my wife went to her to have work done. She has done Mrs. Blum's hairdressing for years, long before she ever worked there at the shop. She was having a shop over in Virginia -- rather, she was working over in Virginia long before she worked on South Capitol Street when Mrs. Blum was going to -- thought enough of her work to go over to Virginia to have her work done.

Q. You mean Mrs. Blum, when living in the District of Columbia, would go all the way over to Virginia to have Mrs. Merriam do her hair? A. Yes, sir.

* * * * *

Q. And your wife got her the job; is that right? A. No, she didn't get her the job. Mrs. Merriam had a job; she didn't need a job. Mrs.

163 Blum was instrumental in telling her there was an operator's job open there on South Capitol Street, and with her experience and how well she worked that she thought it would be mighty nice if she could come over there to work; and she did.

Q. How did Mrs. Blum happen to start going to Mrs. Merriam a way over there in Virginia? A. I don't know whether Mrs. Merriam worked -- I don't know how they happened -- I think Mrs. Merriam worked in another shop in the District before she worked in Virginia. I don't know any details about Mrs. Blum's hairdressing.

Q. Well, after Mrs. Merriam left the Atlantic Beauty Salon there on South Capitol Street, she went down to Pennsylvania Avenue; didn't she? A. Yes.

Q. And your wife continued to go to her down there? A. Yes, she is one of her regular customers down there.

* * * * *
 164 CAROLINE M. BLUM* * * - DIRECT EXAMINATION
 BY MR. BURKE:

Q. Mrs. Blum, would you state your name in full? A. Caroline M. Blum.

Q. Where do you live, Mrs. Blum? A. 3794 Nichols Avenue, Southeast.

THE COURT: Mrs. Blum, keep your voice up. These jurors down here at the far end of the jury box have to hear you.

BY MR. BURKE:

Q. Mrs. Blum, where did you live prior to the time that you lived at Livingston Road, Southeast? A. I live on Nichols avenue.

Q. You are the wife of Mr. Hans Blum? A. I didn't answer your question, but I live on Nichols Avenue now.

Q. Can you hear me all right? A. Yes, I can hear you.

Q. I said, you are the wife of Mr. Hans Blum; are you not?
 A. Yes, I am.

165 Q. Now, Mrs. Blum, I call your attention to the bank premises on South Capitol Street. Did you have occasion to walk on the east sidewalk on South Capitol Street in and around the vicinity of the bank premises? A. Yes, I did.

Q. And did you have occasion to walk there immediately prior to July of 1952? A. Yes, sir.

Q. I understand that you lived within a block and a half of that radius since 1944, is that right? A. Yes, sir, that is right.

Q. What was the condition of the sidewalk, the east side of the sidewalk, of South Capitol Street both above the bank property, below the bank property, and in front of the bank property prior to the time that they commenced construction there? A. I would say in very good condition.

Q. I show you these photographs, Plaintiff's Exhibits 2 and 3, and direct your attention to the broken part of the sidewalk in Exhibit No. 3

and the sidewalk beyond the broken part. Look at that exhibit, Mrs. Blum. What was the condition of the entire sidewalk prior to the construction as compared to the condition exhibited by that photograph?

A. It was not broken up like it is here; it was smooth.

Q. Was it similar to the condition north of the broken part?

A. Yes.

166 Q. Now, how about the area south of the bank property, was that area sound? A. Yes, it was.

Q. So that the whole sidewalk, both north, south, and in the front of the bank property, was sound prior to the construction? A. Yes, sir.

Q. Did you have ample opportunity to observe that prior to the time they commenced their construction? A. Yes, sir.

Q. What was the nature of your observation? How did you happen to be there? A. Well, the shopping center we used all of the time, both for shopping for groceries and there was a movie there which we attended occasionally.

Q. Mrs. Blum, could you speak a little louder so that we can all hear you back here. A. We used it for shopping for groceries and there was a movie there which we attended occasionally.

Q. So that you had to go past there to go to your shopping and to the movie? A. Yes, sir.

Q. Did you ever go there at night after the job was commenced? A. Yes, sir.

167 Q. Was there any lighting over the sidewalk immediately in front of the bank property at night? A. No, sir.

Q. When did you first observe that the sidewalk in front of the bank property commenced to deteriorate? A. After they had started to take some of the dirt away from the lot.

Q. Did you personally see any of the trucks coming on and off that property? A. Yes, I have seen some of them go on.

Q. And when was that? A. Well, it would be during the day, probably in the morning, on Saturday.

Q. You say you just saw them going on; you didn't see any coming off? A. Yes, sir.

Q. And what was the reason for that? A. Well, I would go on about my business.

Q. In other words, your experience was that on the occasion that you saw them, you just saw some going onto the property? A. Yes.

168 Q. Mrs. Blum, I call your attention to these exhibits numbers 4 and 2, and I direct your attention to that wire mesh. Can you tell us whether that fence was constructed after the job commenced or when the job commenced or prior to the commencement of the job?

A. I would say after.

Q. And do you have any idea of how long after that was? A. No, not in days.

Q. Well, when you saw those trucks coming onto the property, was it over the area where the fence is indicated on those photographs or rather through that area? In other words, was the fence up at the time that those trucks were coming on there? A. No.

Q. And do you recall over what section of that lot the trucks were traveling whether it was the south, north, or center, or all over, or wherever you might have seen them? A. I think it would probably be the south end.

Q. Mrs. Blum, how fast did that sidewalk deteriorate after they commenced that construction, if you know? A. Probably within a week.

Q. Did you make any complaints to anyone about the condition of that sidewalk? A. Only to Mr. Blum.

Q. And when did you first discover that Mrs. Merriam had been injured in a fall? A. Probably a week or so later.

169 Q. After she was hurt? A. After she had fallen.

Q. And at that time had that sidewalk already been damaged?
A. At the time Mrs. Merriam was hurt?

Q. Yes. A. Yes, sir.

Q. Do you recall whether there was any covering over the sidewalk prior to the time that Mrs. Merriam was injured? A. No, sir.

Q. Do you recall seeing any sidewalk covering afterwards?

A. Yes, sir.

Q. And do you recall what type of covering it was? A. Planks.

Q. Over what part of that sidewalk were those planks laid?

A. Over the broken part where it was muddy.

Q. Well, would that be the south or the center or the north end of that ground? A. I believe it was at the north end -- I'm not really too sure.

Q. Well, had they put up a fence yet at that time? A. No, it was quite some time until they put the fence up.

170

CROSS EXAMINATION

BY MR. YOCHELSON:

Q. Mrs. Blum, you are the wife of the gentleman who just preceded you on the witness stand; are you not? A. Yes, sir.

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Q. Mrs. Blum, when did this construction work start, do you know? A. Well, it was in the summer; I couldn't tell you what day.

Q. Could you fix a month? A. June.

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172

Q. Now, there came a time, you say, when you saw trucks going onto the property? A. Yes, sir.

Q. How did you see them going on; what part of the lot?

A. I believe it would be what you would say the south end.

Q. The south end? A. The south end, I think that is the way it was.

Q. Was there a driveway where they came on? A. No, there had been no driveway; there were planks where the trucks had been going on.

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173

Q. Was there a driveway on the north end of the lot? A. Not that I can recall, no.

Q. Did you ever see cars parked on that lot prior to the starting

of construction? A. I have never seen cars; I have seen a car sitting in there for days on end.

* * * * *

174 Q. Now, the one truck and the only truck I think you said you saw go on the property, did you notice whether or not it had caused any breakage in the sidewalk? A. No, sir, I didn't.

Q. Did you notice any name or identification on that truck?
A. No, sir.

* * * * *

175 BY MR. ROBERSON:

Q. Do you drive an automobile? A. No, sir, I don't.

Q. Does your husband have one? A. No, sir.

Q. How many years have you known Mrs. Merriam? A. About eight years.

Q. Under what circumstances did you first come to know her?
A. I met her through a mutual friend.

Q. You met her socially? A. Yes, sir.

* * * * *

176 Q. Well, where was she working at the time you first met her?
A. In Virginia.

Q. Where in Virginia? A. Washington Lee Shopping Center, I believe it was called.

Q. Did you go over to Virginia to have her do your hair? A. Yes, sir, I did.

Q. How would you get over to Virginia? A. By bus.

* * * * *

Q. And you were instrumental in getting her a job over at Atlantic Beauty Salon; weren't you? A. Yes, I did

177 Q. When she moved from Atlantic Beauty Salon down to Pennsylvania Avenue, you followed her down there to have her do your hair; didn't you? A. Yes, I did.

Q. You would go back and forth to her shop in Virginia and now on Pennsylvania Avenue by bus? A. Yes, sir.

178 Q. And over part of that sidewalk, the water would run because there was a high bank toward the back of the lot; wasn't that true?

A. There is a high bank, yes.

Q. And did the water drain over part of this sidewalk in front?

A. It is possible; I couldn't tell you.

Q. Well in passing it three or four times a week, didn't you ever observe that? A. There is water all along the street as you walk along where it would drain off.

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HOWARD AUGUSTINE MERRIAM * * *

DIRECT EXAMINATION

BY MR. BURKE:

Q. Mr. Merriam, would you state your name, sir? A. Howard Augustine Merriam.

Q. Where do you live, Mr. Merriam? A. 3717 Rhode Island Avenue, Brentwood.

Q. Mr. Merriam, I call your attention to July 17, 1952; did you at that time know a Mrs. Sudie Phipps who is now Mrs. Merriam?

181 A. Yes, sir.

187 Q. Mr. Merriam, did you have occasion to go to the bank premises to observe the condition of the sidewalk after Mrs. Merriam was injured? A. Yes, sir, I did.

Q. About how long after? A. The next day.

Q. I show you these photographs, particularly Plaintiff's Exhibit No. 3 and Plaintiff's Exhibit No. 2, and I ask you to look in Exhibit No. 3 at the sidewalk north of the bank property. Do you see the condition of that sidewalk? A. Yes, sir, I do.

Q. Was it in that condition at the time that you saw it when you went there the day after the accident? A. Yes, sir, it was.

Q. And was the broken part in the same condition? A. Yes, sir.

Q. Now, I direct you to the other photograph, that is I think Exhibit No. 2, and I ask you whether that was the condition of the sidewalk

in front of the premises, as it is depicted in that photograph, the day after she was hurt? A. Yes, sir.

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188

CROSS EXAMINATION

BY MR. YOCHELSON:

Q. Mr. Merriam, were you familiar with the condition of the sidewalk prior to your wife being hurt? A. No, sir, I was not.

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ALEXANDER SCOTT OFFUTT * * *
DIRECT EXAMINATION

BY MR. BURKE:

Q. Mr. Offutt will you state your name, sir? A. Alexander Scott Offutt.

* * * * *

Q. Mr. Offutt, you are the president of the Anacostia National Bank? A. I am.

Q. Were you the president of the Anacostia National Bank in July of 1952, sir? A. I was.

189

Q. Do you have the records of your relationship with the Nebel Company in the construction of that building which I had subpoenaed? A. I do.

Q. Can I have them?

Mr. Offutt, did you have a contract with an architect?

A. Yes, we had a contract with an architect.

* * * * *

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Q. Mr. Offutt, did there come a time when your bank decided to build a building -- strike that -- is your bank the owner of the property on South Capitol Street where your new bank building is now located? A. It is.

Q. And were they the owners of that property on July 17, 1952?

A. They were.

Q. And had they at that time entered into a contractual relationship for the construction of a bank building on those premises? A. We had.

191

Q. With which company had you entered into that agreement?

A. Joseph Nebel Construction Company, Incorporated.

Q. I show you this, sir, and ask you whether this was the agreement which was entered into with the Nebel Company? A. This is the contract entered into by the Joseph Nebel Company, Incorporated, of which I was a party.

* * * * *

Q. I notice, sir, that this contract refers to specifications, general conditions concerning excavating and filling, concrete work, and an addendum to the contract. Were they included in your contract which is presently being identified? A. Right.

Q. I show you these items and ask you whether these are the items to which I have just referred? A. They are.

* * * * *

192 Q. In connection with those contracts, Mr. Offutt -- or let me say prior to the time that you engaged Mr. Nebel, had you engaged an architect to prepare plans and specifications for the construction of your building? A. We did.

Q. Who was that gentleman? A. Leon Chatelain, Jr.

* * * * *

Q. Now, then, isn't it true -- strike that. In entering into the contract with the Nebel Company, is it true, sir, that you reserved the right of supervision of the job through your architect? A. I think that is general duties of an architect.

Q. I ask you whether it isn't true, and you did that, sir?

A. We had a contract with an architect.

193 Q. And you reserved the right of supervision of the job through your architect; did you not? A. Correct.

* * * * *

194 Washington, D. C.

Tuesday, April 17, 1956

* * * * *

195 Q. Mr. Scott, I think we had already identified you as the president of the Anacostia National Bank and that you were the representative

of the bank and you in behalf of the bank entered into contracts which were identified as Plaintiff's Exhibits 8, 8-A, 8-B, and 8-C; am I right?

A. That is right.

Q. Now, Mr. Offutt, do you have that contract with your architect?

A. Yes.

Q. After you entered into this contract with the Nebel Company, I notice in your contract that there was a provision that work was to be commenced within a certain time; that is true, isn't it? A. That is right.

Q. And did they commence it within the time provided in the contract? A. They did.

Q. And was the work pursuant to the contract undertaken by the Nebel Company? A. They were the general contractor, of course.

Q. Now, Mr. Offutt, in your engagement with Mr. Chatelain, your architect, did your bank put Mr. Chatelain in control of supervising and checking the job and keeping you advised of its progress?

MR. YOCHELSON: I object, if the Court please. Mr. Burke has the contract. He asked for it. I believe the contract speaks for itself.

BY MR. BURKE:

Q. Do you know that, Mr. Offutt?

THE COURT: The objection is sustained. The contract speaks for itself.

MR. BURKE: Well, Your Honor, the first thing I want to do is offer the three sections of the contract, which we discussed at the bench on behalf of the plaintiff.

THE COURT: Very well.

MR. BURKE: Your Honor, may I read those sections to the jury?

THE COURT: Yes, Before you read anything, identify the paper by exhibit number.

(Thereupon, Mr. Burke read into the record Plaintiff's Exhibit Number 8, Article 5; Plaintiff's Exhibit Number 8-B, Articles 5, 11, 12, 13, 14, and 38; and Plaintiff's Exhibit Number 8-C, Sections 2-06, 2-11, and 2-17.)

MR. BURKE: May we discuss the other two sections at the bench?

THE COURT: Yes.

(After conference at the bench, during which Articles Numbers 36 and 37 of Plaintiff's Exhibit Number 8-B were discussed, the trial proceeded as follows:)

(Thereupon, Mr. Burke read into the record Article 36 and subsection (a) of Article 37 of Plaintiff's Exhibit Number 8-B.)

BY MR. BURKE:

Q. Now, Mr. Offutt, in line with the provisions of the contract, and more particularly the terms which I have just read to the jury and the Court, did your architect assume his duties and perform such?

MR. ROBERSON: If it please Your Honor, he is asking for a conclusion of law as to what the architect's duties were. It is certainly not the interpretation Mr. Burke is putting on it. They can speak for themselves. I don't think he can call on this witness, unless he is an expert on contract law, for an interpretation of these complex documents that Mr. Burke has seen fit to put into evidence.

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MR. YOCHELSON: If Your Honor please, we will stipulate that he assumed the work, but that is not to say that is the answer called for by Mr. Burke's question.

* * * * *

THE COURT: You want to know whether or not he acted as the architect pursuant to this contract?

MR. BURKE: That is right.

THE COURT: You may answer that.

THE WITNESS: He was the architect under the contract.

BY MR. BURKE:

Q. He undertook to act as architect pursuant to this contract?

A. Under the contract which I gave him.

Q. By the way, Mr. Offutt, in his dealings in connection with this contract, did he report to you as the representative of the owner, or was

199

there any other person in your bank that had anything to do with the progress? A. Not necessarily, no.

Q. Well, what does that mean, sir? Did he report to you any reports that he had to make or that he did make? A. Under the terms of his contract and he reported to us for certification of work that had been completed, and we paid the bills as submitted.

Q. Well, when you say to us, I asked you whether you were there when he reported? A. Well, it was usually just by letter.

Q. You had to pass on it? A. Yes, on the payment of the funds on the certification, yes.

Q. Now, then, did he at any time report to you, sir, that the sidewalk in front of the bank property had been badly broken? A. No.

Q. He did not? A. No.

Q. And did you or did he for you at any time request that lights be installed on the property to light up any broken sidewalk at night in front of your property? A. No.

Q. Did your bank cause any lights to be installed from your property to light that sidewalk at night during the course of this job?

200

MR. YOCHELSON: If the Court please, I object to it. The duty to light the sidewalk is imposed on the District of Columbia and not on the owner of the adjacent property.

THE COURT: The objection is overruled. The witness may answer.

THE WITNESS: We did not cause any lights to be erected on the property.

BY MR. BURKE:

Q. Now, did you receive any reports, sir, requesting that boards or covering be put over any broken sidewalk in front of your premises while the construction was going on? A. We did not.

Q. Did you or your architect, direct the contractor, or anyone to put any boards over any broken sidewalk over the property? A. We did not.

THE COURT: You are speaking now for the bank?

THE WITNESS: Yes, I mean as far as under no direction of ours, no.

BY MR. BURKE:

Q. When I say "you," I am of course referring to the Anacostia National Bank.

THE COURT: Mr. Burke, the first question you put was about the bank and the architect, and his answer was as to the bank, as I recall it.

201 THE WITNESS: Yes, ma'am. I can't speak for the architect.

* * * * *

BY MR. BURKE:

Q. Now, Mr. Offutt, was the broken sidewalk in front of the premises ever discussed with your bank or with anyone from your bank, or with you or your architect, or with you through your architect?

A. No, I have no knowledge of it.

202 Q. Do you know whether or not your plans and specifications called for the recovering of the sidewalk in front of your premises?

A. I do not.

Q. Did you or your bank or your architect, or though your contractor, call upon the District of Columbia to repair or replace that sidewalk when your building was completed? A. I had no connection with it. I do not know.

Q. Well, who would know that, sir? A. I think the terms of the contract would provide it.

Q. Would your architect know who finished or completed that sidewalk? A. He may. I can't answer for him.

Q. You don't know? A. No, I do not.

Q. Mr. Offutt, when your building was completed, the sidewalk in front of your building was also resurfaced; was it not? In other words, you had a new sidewalk in front of your premises? A. Yes, from the building line to the curb.

MR. BURKE: All right, you may examine.

CROSS EXAMINATION

BY MR. YOCHELSON:

Q. Mr. Offutt, when did you first become acquainted with the condition of the sidewalk in front of the bank property on South Capitol Street? A. I had occasion to visit the lot over the period of more than

203 a year prior to the time the work was commenced there, and obviously had an opportunity to view the general area all the way along there.

Q. The work in this case commenced in -- I think the testimony is -- July, 1952? A. That is correct.

* * * * *

Q. And was it in the year 1951 that you first became acquainted with the condition there? A. That is correct.

Q. Mr. Offutt, I want to show you a photograph, which has been admitted into evidence as an exhibit of the plaintiff and which purports to be the condition of the sidewalk in front of the bank premises in July of 1952. I ask you to look at Exhibit Number 1, and Exhibits Numbers 2, 3, and 4 and ask you, sir, whether or not the condition of the sidewalk, as depicted in those pictures, was the condition that existed prior to the start of any work? A. Yes, that is true. And while these are blown up pictures, this is only a slim flaking of the cement. It just has been gradually broken off the top of the walk. As a matter of fact, there are some similar places just north in front of the apartment house today.

204 Q. When, from your own personal visual inspection, did the condition such as is shown in these photographs first appear, to your knowledge? A. They were there on my first visit to the property.

Q. Were they there in the same degree and to the same extent of deterioration as these pictures show? A. I would say yes.

Q. I take it then, sir, that the performance of digging and construction did not alter the condition of the sidewalk as shown in these pictures?

A. I don't believe they did.

Q. Now, Mr. Offutt, when building began did you personally visit the site of the building? A. Almost daily.

Q. Beginning when, sir? A. Several times prior to the beginning of the actual work, and definitely on the first day that the work began.

Q. I ask you, sir, whether you were present on the day that trucks first entered the property for the purpose of making excavations?

A. I was.

Q. Did you make any photographs at the time? A. I did.

205 Q. I show you a snapshot, sir, and I ask you if you can identify this snapshot? A. Yes, that is a snapshot that I took.

Q. Can you tell us on what date you took it? A. I can't give the exact date, but it was the date they broke ground and started the first truckloads of dirt coming out.

MR. YOCHELSON: If it please the Court, I offer this snapshot in evidence as Defendant Bank Exhibit Number 1.

* * * * *

206 Q. Mr. Offutt, I note in the picture some planks coming from the street, across the curb, and across the sidewalk. A. That is correct.

207 Q. I ask you, sir, on how many occasions were you present when trucks either entered or departed from this lot? A. I visited the scene almost every morning and many times during the middle of the day. And in the afternoon, of course, work had ceased at the time I got there.

Q. At any time during which trucks were leaving this property did you ever notice the absence of these boards? A. I did not.

Q. Or state it to the contrary; were the boards and planks always there when the trucks were using it? A. Whenever there was traffic going over the sidewalk, they were there.

Q. Can you tell me, sir, what happened to the planks at the close of the work day? A. They were removed and laid back on the grass.

Q. There is an individual depicted in this picture in close proximity to the planks. Can you tell us, sir, what that individual was doing there? A. He was brushing the sidewalk with a push broom and whenever a truck went through there, if dirt dropped off it was his duty to sweep it off immediately.

Q. At all times when you were there did you observe an individual performing that duty? A. I did.

208

Q. Can you tell us, Mr. Offutt, whether or not the trucks in entering and leaving the lot followed a fixed or uniform pattern in the place of entry and the place of departure? A. They did. They went in on the north side, circled around to the steam shovel, loaded, and came out on the south side over those planks.

Q. Now, Mr. Offutt, on Plaintiff's Exhibits Numbers 2 and 3, an X mark appears which was identified by the plaintiff as being the spot on which she fell. I ask you, sir, whether or not that X mark and the spot indicated thereby was in the path of travel of the trucks at any time?

* * * * *

THE WITNESS: The trucks left on the south end of the lot.

Q. And was that farther south than the X marks? A. It was nearer the bungalow on the south end of the lot, which would be further south.

Q. Now, with reference to Defendant's Exhibit 1, will you tell us, please, whether or not the X mark is within the area covered by the planks? A. It is not.

209

Q. And is the planked area shown in that picture the area from which the trucks at all times departed from the lot? A. That is correct.

Q. Is the X mark shown on Plaintiff's Exhibit number 2 or 3 within the area to the north of the lot where the trucks entered the lot?

A. No, it is between the two places.

Q. Can you testify, Mr. Offutt, whether or not the trucks, from your observation, in entering or leaving the lot caused any damage to the sidewalk? A. I don't think they caused any damage at all.

MR. BURKE: I object to what he thinks, Your Honor.

THE COURT: The objection is sustained.

BY MR. YOCHELSON:

Q. Did you observe any damage that they did? A. I did not observe any damage done by the trucks.

Q. Mr. Offutt, how close to the point indicated on Plaintiff's Exhibits 2 and 3, as being the points of the fall, is the nearest street light? A. Immediately across South Capitol Street there is and has been a pole with a light on it that is directly opposite that spot.

Q. And when you say has been, I take it that it was there on July 17, 1952? A. It was.

210 Q. Was the light on that pole adequate to light the east side of the street at the spot where the fall occurred? A. Yes.

* * * * *

Q. Have you ever been there at night? A. I have been there at all hours.

* * * * *

Q. May I ask the question whether you were there at night in July of 1952? A. I was.

Q. Was the light in July of 1952 adequate to light the sidewalk on the east side? A. Yes.

Q. On the northerly extremity of the lot where you indicated that trucks entered the lot, was there a pre-existing driveway? A. There was.

211 Q. And how long has that driveway existed, to your knowledge? A. Well, naturally, to my knowledge it was not prior to 1951 because I first saw it in the latter part of 1951.

Q. And it was there when you saw it? A. It was there.

Q. Did you ever receive any complaint with respect to any broken sidewalk there? A. Never.

* * * * *

REDIRECT EXAMINATION

BY MR. BURKE:

* * * * *

Q. But you visited the premises at least a year or about a year -- A. During 1951, yes.

Q. And when you visited the premises you saw this sidewalk broken

212 just as it is now -- you said just as it was at the time of this accident? A. With the top flaked off that way.

Q. Did you, or anyone through your direction, ever report that to the Government of the District of Columbia? A. We did not.

* * * * *

215 MR. BURKE: * * * I would like to pass the photograph to the jury and direct their attention to the sidewalk.

THE COURT: Very well.

(Defendant Bank's Exhibit Number 1 was passed among the jurors.)

MR. BURKE: I would also like to pass Plaintiff's Exhibit 7 to the jury so a comparison can be made of the location of the center of that lot.

* * * * *

216 THE COURT: Well, it is all right if you want to pass it around, so long as the jury understands this is the back of the lot and the other is the front of the lot.

* * * * *

Q. Now, Mr. Offutt, you testified that you were there on the date that the first truckload of dirt was hauled away from that lot? A. That is correct.

Q. What was the reason for your being there on the date that the first truckload of dirt was hauled off? Was there a special occasion for that? A. I visited there practically every day.

Q. Well, how did you know that the first truckload of dirt was going out? A. Because I had been there the day previously.

217 Q. And you were advised that they would start digging that morning? A. Work was supposed to start.

Q. And you came there just to see them commence starting to dig? A. As I said, I went there practically every morning.

Q. All right, sir, now, you testified that you were there every morning as a rule and sometimes at noon, but that you didn't go at the end of the day because they were through then; is that right?

A. I did go by there many times, but construction work of course had ceased by the time I got there in the afternoon.

Q. So at the time you went there at the end of the day the construction work was no longer going on? A. That is correct.

Q. And how could you tell whether or not the planks were removed and laid on the grass at the end of the day? A. Because they were on the grass at the end of the day. The sidewalk was clear.

Q. When you came by there sometime at the end of the day you saw the planks on the grass? A. That is right.

* * * * *

218 Q. Now, then, you were there in the morning and sometimes at noon, but you testified that you saw them sweeping the walk. Did they sweep it in the morning? A. Whenever trucks passed, the man was there to take off any dirt that was dropped there from the truck as the truck bounced over the boards.

Q. You mean there was a man standing there whose duty it was to do nothing but sweep the droppings of the trucks? A. That is correct.

Q. So that he wasn't sweeping the sidewalk. He was just sweeping the truck droppings? A. That is right.

Q. He was there in the morning when you were there and he was there whenever you were there at noon? A. That is correct.

* * * * *

223 Q. If the average length of an automobile is about twenty feet, would that change your mind, Mr. Offutt, about the length of that steam shovel to which the shovel extended? A. It might vary a foot or two.

Q. And you notice from that photograph that it shows trucks coming in and out; do you not? A. That is right.

Q. And the trucks come in from the left side of that steam shovel and go out from the left side of that steam shovel; do they not, sir? A. They come in from the extreme left and come out, yes, just to the north of it, right underneath it.

Q. Isn't it true then that they come in from the north end of the lot and go out the center of the lot? A. To the south; that lot is 125 feet.

Q. My question was the center. A. That is 125 feet long.

Q. You deny, sir, those trucks come out the center of the lot as depicted by your photograph? A. That is not the center.

Q. Now, then, Mr. Offutt, you were there every day, every morning, when they first started excavating. They had no poultry fence or wire fence or some other kind of fence there, did they? A. There was no fence at this time, no.

224 Q. For how long a period of time did it continue that way without a wire fence? A. I would think ten to fifteen days.

Q. So that for about ten to fifteen days the trucks and bulldozers, or any other vehicles that were used in the excavation, could have come out anywhere along that property? A. Every exit that I saw, they came out over the boards.

Q. Well, Mr. Offutt, they didn't actually have exits because there wasn't any fence or doorways; was there? A. Every truck I saw come over the sidewalk came over on the boards.

Q. The trucks that you saw come over the sidewalk? A. That is right, that is correct.

Q. But you weren't there all day long. You were president of this bank, weren't you, and had to attend to your duties? A. That is correct.

Q. And you don't know what took place while you weren't there, do you? A. Naturally.

Q. And when you were there, how many minutes did you spend there? A. Probably a half hour.

225 Q. So that you were there a half hour every morning?
A. Approximately.

* * * * *

Q. No, I am asking you about the question which you had answered, put to you by your counsel when he directed you to Plaintiff's Exhibit 2 and the X mark that had been put there by the plaintiff indicating where she fell. He asked you whether or not there had been any boards over that area and you said no, because that had not been used for ingress

or egress; is that right, sir? A. Yes, on the picture these boards are to the south of that, based on this picture. That was my answer that this spot, as shown by this picture, is not the same spot as shown by the X.

226 Q. Isn't it a fact, sir, that the place indicated by X is just about the spot where your trucks in your photographs come off the property after being loaded? A. No.

Q. What was it, sir, that directed your attention to the light across South Capitol Street so that you know whether it threw enough light or did not throw enough light in July of 1952? A. All of the lighting in that section, peculiarly enough, is on the opposite side of the street, and I did notice that peculiarity.

Q. Now, did you have occasion to use that sidewalk at night in July and notice the darkness or the lightness, the visibility? A. I had been in the community.

Q. Well, I asked you whether you had occasion to use this sidewalk in front of your property -- let me finish my question -- I asked you whether you had been there at night in July of 1952 and you had occasion to notice whether there had been enough light thrown from the light somewhere across the street at night? A. I had been there at night in July of 1952 and had been on the property.

227 Q. And what was it that caused you to come there in July of 1952 at night? A. At times when I passed there late in the evening, I went in that community and I had been on the property and without any other illumination I could see what had taken place.

Q. Did you live in that area? A. No.

Q. Did you do any purchasing in that area? A. I spent a great deal of time in that area.

Q. What reason did you have to come there at night? A. I attend civic meetings, Lions Club meetings.

Q. Was that in July of 1952? A. They run the year around.

Q. And where was the civic meeting that you attended in July of 1952? A. I go to a Lions Club meeting in that community.

Q. Where is that located? A. The Anacostia Lions Club. It is not in that immediate community. But I had occasion to go from there to go by the property.

Q. Well, just where is it or where was it in July of 1952 that brought you at night time in front of these premises? A. Our meeting place, if that is what you mean, is over at the Bradbury Heights Church.

228 Q. How far is that from this area? A. Probably a mile or so.

Q. Beyond it or north of it? A. To the east.

Q. A mile to the east of this area? A. That is right.

Q. And was there any other way to get there besides South Capitol Street? A. Definitely.

Q. You could have gone up Wheeler Road, couldn't you, sir, or even Nichols Avenue? A. Oh, yes.

Q. So that you didn't have to go a mile out of your way to go to this meeting, did you, sir? A. No. My interest was in this property. I was only telling you why I was in the community at night.

Q. You were so interested in this property that you came there morning, noon, and night? A. That is correct, I have been all hours of the day and night, Saturdays and Sundays.

Q. You wanted to see it in the darkness; is that right, sir?
A. I wanted to see what had taken place.

229 Q. Was there any other meeting that you went to besides this Lions Club that brought you there in July at night?

* * * * *

231

RE CROSS EXAMINATION

BY MR. ROBERSON:

Q. Mr. Offutt, you spoke of the condition prevailing at the time of this lady's accident on the sidewalk as having existed there for many months prior to construction and as being a flaking of a thin dust cover. Would you explain to the court and jury what you meant by that?

A. It was sort of pockmarked, and all cement I think probably has a thin coating on the top that could very easily break. I have had it do it

in my own property, chip off, just the top coating, in sort of a flaky peeling.

Q. So the jury will know whether you are talking about a big cavern that you can fall down in, or what you mean by a thin top dust coat, what was the depth --

MR. BURKE: Unless Mr. Offutt is an expert on cement, I would object to him testifying to his thoughts on how cement crumbles or what happens to cement. He is not qualified as an expert.

THE COURT: He is not testifying to that. He is testifying to this condition as it appeared to him. The objection is overruled.

MR. BURKE: He asked him what it appeared like to him. He was testifying from his experience with cement.

232 THE COURT: The objection is overruled.

THE WITNESS: I would say the flaking would be approximately a sixteenth of an inch.

BY MR. ROBERSON:

Q. At its deepest place, what would you say the depth of that flaking off would be? A. It varied I suppose more than a sixteenth of an inch. It -- with these blowup photographs it is very difficult to tell, but it might be as much as three-eighths to a quarter at the most.

Q. Certainly there wasn't any place in that sidewalk in the area where she claims to have fallen, with an X mark, that as much as an eighth inch deep, was it? A. No.

BY MR. YOCHELSON:

Q. Mr. Offutt, you testified that a fence was erected subsequent to the start of the building, possibly ten or fifteen days later, and I think there is a fence which reveals itself in the exhibit that the plaintiff has offered. I show you specifically Exhibit 5 and ask you if that is the fence to which you referred? A. That is.

Q. And directly south of that post marking the end of the fence, is that the place where the trucks departed from the lot? A. That is.

233 It is quite evident by the picture.

Q. I ask you, sir, whether or not that is the same spot as is covered by the planks and which represents the place where the trucks left the lot as shown in the small photograph taken by you and which is identified as Defendant's Exhibit 1? A. I believe it is.

* * * * *

235 Q. And isn't it a fact, sir, that the exits of your trucks were very much north of this driveway, as shown in Exhibit 5? A. That is to the south. That is the south end.

Q. That is to the south of the lot, but your trucks when they first came off of that ground were very much to the north of that? A. No, I don't think so.

MR. BURKE: I would like to pass these two photographs to the jury again for comparison, Your Honor. Defendant's Exhibit 1 shows the steam shovel, which he has testified was on this property, and the size of the shovel; and Plaintiff's Exhibit 5 shows the last opening for the exit of trucks, which he says was at the southern extremity of this property.

THE COURT: This gate opening here, this roadway here, was the exit?

THE WITNESS: That was the exit.

* * * * *

236 MR. BURKE: I would like to pass these around and direct the attention of the jury to the steam shovel, which has been testified to as being near the southern end of the opening; and Exhibit Number 5, which the witness has testified was the opening for the exit which was used when the trucks first came off of the property as indicated in Defendant's Exhibit 1, the small photograph.

(Exhibits referred to were passed among jurors.)

BY MR. BURKE:

Q. Now, Mr. Offutt, you have testified in response to Mr. Roberson's question that you examined the break and that there was only a sixteenth of an inch or an eighth of an inch, or three-eighths of an

inch break. I show you these two photographs, Plaintiff's Number 3 and Plaintiff's Number 1, and ask you, sir, isn't that the actual condition of the sidewalk as you observed it? A. This is a blownup photograph, of course.

Q. But it gives you the picture of the sidewalk? A. It makes it look a little worse than it actually looked to the naked eye.

237 Q. It is your theory, sir, that photographs do not give an accurate picture; is that right? A. I think this is blown up a little large.

* * * * *

BRIEF FOR APPELLEE JOSEPH F. NEBEL

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals

For the

District of Columbia Circuit

No. 13,479 FILED

OCT 30 1956

SUDIE PHIPPS MERRIAM

Appellant,

Joseph W. Stewart

CLERK

v.

ANACOSTIA NATIONAL BANK. AND JOSEPH F. NEBEL.

Appellees.

**Appeal from the United States District Court
for the District of Columbia**

FRANK F. ROBERSON,

JOHN ROSS,

Attorneys for Appellee

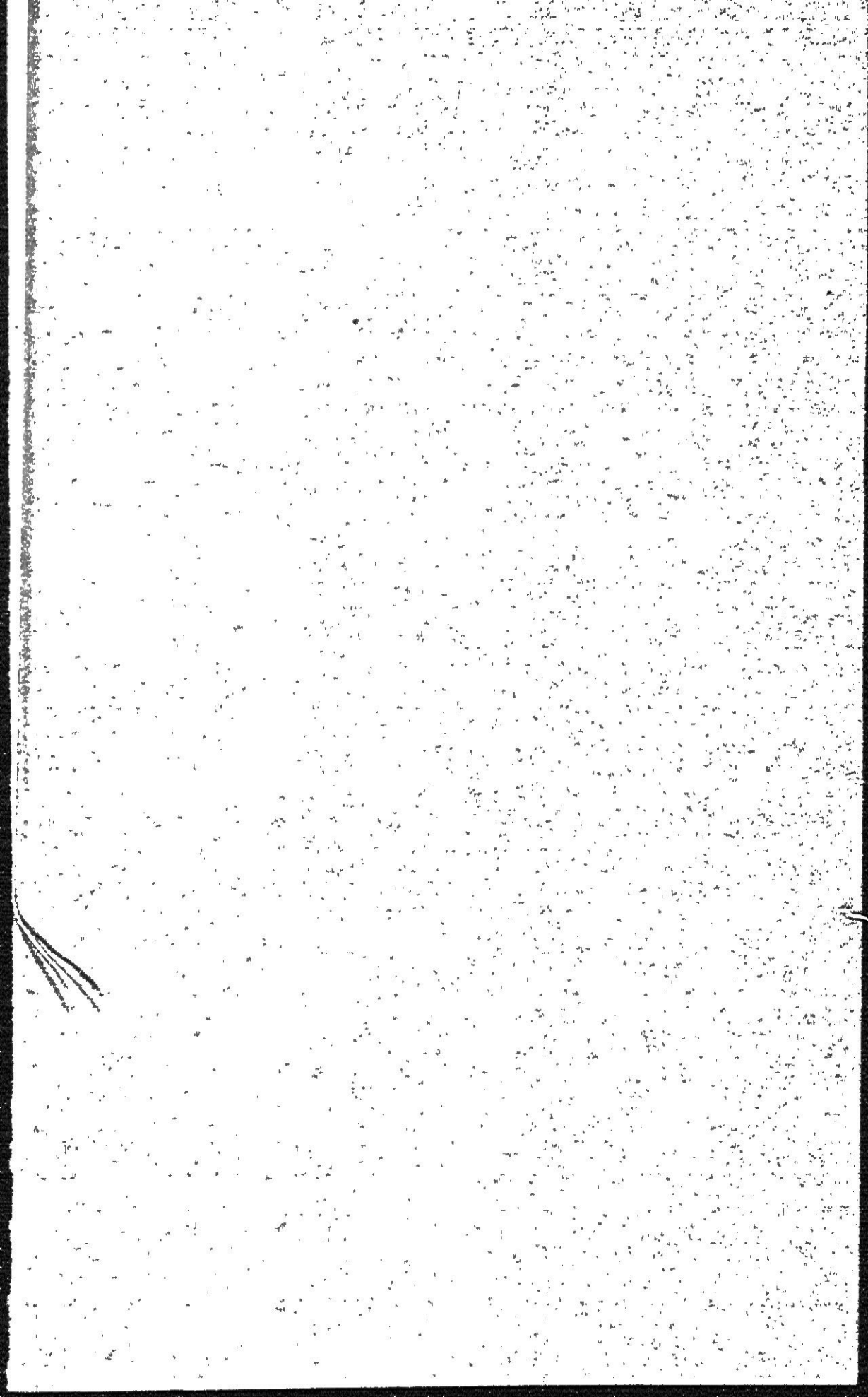
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Question Presented

The question presented is whether a general contractor to construct a building is liable for an independent subcontractor's alleged negligence in an operational detail upon a nearby public sidewalk.

INDEX

	Page
Counter-Statement of the Case	1
Summary of Argument	3
Argument	5
1. For an independent contractor's negligence in a collateral matter, a general contractor is not responsible	5
2. A building regulation on "Protection and Restoration of Adjoining Property" does not create any right of action in a pedestrian on a public sidewalk	8
3. There is no duty by non-creators of defects, except the municipality, to maintain a public sidewalk or to warn users of dangerous conditions therein	10
4. The various contractual undertakings between owner-architect and owner-contractor do not create rights in a third party	11
5. Plaintiff's lack of due care for her own safety precluded a recovery	12

CASES

<i>Bailey v. Zlotnick</i> , 80 U.S. App. D.C. 117, 149 F.2d 505 (1945)	5
<i>Barrabee v. Crescenta Mut. Water Co.</i> , 88 Cal. App. 2d 192, 198 P. 2d 558 (1948)	7
<i>Becker v. Northland Transp. Co.</i> , 200 Minn. 272, 274 N.W. 180 (1937)	7
<i>Broderick v. Cauldwell-Wingate Co.</i> , 301 N.Y. 182, 93 N.E. 2d 629 (1950)	11
<i>Hubert v. Aitken</i> , 5 N.Y. Supp. 839 (Com. Pleas 1899)	11

	Page
<i>Johnson v. Seattle Taxicab & Transfer Co.</i> , 85 Wash. 551, 148 Pac. 900 (1915)	6
<i>Radinsky v. Ellis</i> , 83 U.S. App. D.C. 172, 167 F. 2d 745 (1948)	9
<i>Trecartin v. Mahony-Troast Const. Co.</i> , 18 N.J. Super. 380, 87 A. 2d 349 (1952)	11
<i>Weeks v. Texas Illinois National Gas Pipeline Co.</i> , 276 S.W. 2d 321 (Tex. Civ. App. 1955)	7

REGULATION

The 1951 Building Code of the District of Columbia, § 308	8
---	---

OTHER AUTHORITIES

93 A.L.R. 799 (1934)	9
Parker & Adams, <i>The A.I.A. Standard Contract Forms and The Law</i> (1954)	11
Restatement, Torts (1934)	
§ 349	10
§ 426	5

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,479

SUDIE PHIPPS MERRIAM

Appellant,

v.

ANACOSTIA NATIONAL BANK, AND JOSEPH F. NEBEL,

Appellees.

**Appeal from the United States District Court
for the District of Columbia**

BRIEF FOR APPELLEE JOSEPH F. NEBEL

Counter-Statement of the Case

The plaintiff filed a complaint against (1) the appellee Anacostia National Bank, which owned a vacant lot, (2) appellee Joseph F. Nebel who contracted to construct a bank building on the lot, and (3) the independent subcontractors of the excavation work for the building (J. A. 2).^{*} Without discriminating between the several de-

^{*} Plaintiff dismissed as to the excavation subcontractors at pretrial after having failed to follow-up to obtain service of process.

fendants, the complaint charged that they did negligently cause a sidewalk in front of the premises to be damaged and permitted it to remain so without warning to the injury of the pedestrian plaintiff (J.A. 3). Neither the complaint nor plaintiff's pretrial statement claimed violation of any building regulation or contractual provision. Objection was unsuccessfully made when plaintiff introduced this new matter at the trial (R. 68, J.A. 25; R. 195). Plaintiff turned her ankle about 17 days after the clearing of the lot started and before the excavators were through (J.A. 11, 16, 18). There was concededly no evidence at the trial to connect the trucks which allegedly damaged the sidewalk with either the landowner or the general contractor (Appellant's brief 7). It was stipulated at pretrial (J.A. 19) that the accident in question was on the sidewalk and it is conceded that the sidewalk was owned by the District of Columbia (Appellant's brief 7).

Plaintiff testified that she could feel the roughness underfoot for six or eight steps before she turned her ankle (J.A. 16). She testified that she proceeded on although feeling the roughness and that it was very dark (J.A. 16). There was a street light across the street (R. 38, J.A. 11, 24).

At the close of plaintiff's case, defendant Nebel, the general contractor, moved for a directed verdict based upon the absence of any showing of negligence upon his part, upon his non-responsibility to the plaintiff for the alleged negligence on the public sidewalk of the independent excavation subcontractor and upon the plaintiff's contributory negligence as a matter of law if she proceeded on, as she claimed, six or eight steps into a dark area which felt rough when it was so dark that she could not see. The trial judge granted the requested directed verdict without singling out any particular one of the grounds urged (Appellant's brief 5).

Summary of Argument

Plaintiff's proof failed to make out a case against the general contractor for construction of the bank because, as plaintiff's brief concedes, he did not himself create the condition complained about and because he owed no duty to a pedestrian with respect to the acts of the independent excavation contractor upon a public sidewalk. Plaintiff failed to establish any duty to the pedestrian plaintiff which was violated by the general contractor because he owed her no duty to maintain the public sidewalk free from defects, nor to warn her of alleged dangers created by others.

Plaintiff's brief resolutely refuses to recognize the fundamental distinction between a general contractor's liability for defects created in the premises upon which the contract work is to be done and his non-responsibility for the acts of independent sub-contractors on the public sidewalk with respect to an operative detail. Just as the general contractor would not be liable for negligence of an independent contractor while en route via the public streets to the building site, he is not responsible for the other's alleged negligence in entering or leaving the site upon the adjoining public sidewalk because each instance would be negligence with respect to a matter collateral to the excavation of the bank building foundation.

Assuming that plaintiff produced substantial proof that the excavation contractor had damaged the public sidewalk, the general contractor, in so far as plaintiff is concerned, had no duty to correct it. Similarly, no duty to warn existed. Before there could be complaint of negligence as to plaintiff, there would first have to be established a duty owed her by the one against whom she claimed.

The building regulation entitled "Protection and Restoration of Adjoining Property" played no part in the litigation and was mentioned in neither the plaintiff's complaint nor pretrial statement. The regulation does not

purport to create liability and plaintiff is not one to whom the regulation created any duty as she is not an adjoining owner. Moreover, the regulation is obviously intended to apply to damage by reason of the excavation itself, such as protection and support of its sides or those of the structures adjacent. It is not pertinent to a public sidewalk defect created by the collateral negligence of an independent contractor.

Retention of sufficient supervisory privilege to see that plans and specifications are carried out does not render the retainer responsible for the acts of independent contractors. It is common knowledge that such retention gives no right to control details of operations which have no bearing on the work contracted to be done, which in this instance was the erection of a bank building. Accordingly, the multitude of owner-architect and owner-general-contractor contracts which plaintiff insisted on putting into evidence do not create as to the plaintiff any legal liability. Such contracts affect the relations and liabilities among the parties to them and do not create new rights as to third persons not privy to them.

Plaintiff's citations to nuisance cases where created as part of the very work the contract called for is simply another refusal to draw the plain distinction between a condition to be created on private property and one where the contract calls for work on public property. Erection of a bank building neither requires nor reasonably contemplates doing damage to the public streets or sidewalks.

Finally, if the way was as dark and dangerous as the plaintiff testified, she was guilty of contributory negligence as a matter of law in proceeding six or eight steps into a roughened area when there was a lighted way readily accessible across the street.

ARGUMENT

1. For an independent contractor's negligence in a collateral matter, a general contractor is not responsible.

Plaintiff's assertion of liability on the part of Nebel amounts to a claim that a general contractor is liable for any and all negligence of an independent subcontractor. This is the claim because there is no proof in the record that the general contractor did anything which would affect the public sidewalk during the brief period between the July 1st start of excavation and the accident of July 17th (Appellant's brief 7).

However, the very case which is plaintiff's reliance for the vicarious liability asserted recognizes that in factual situations of collateral negligence there is no liability on the employer of an independent contractor. Thus, in *Bailey v. Zlotnick*, 80 U.S. App. D. C. 117, 149 F.2d 505 (1945) the Court quotes with approval in footnote 3, at 118, 506:

³ RESTATEMENT, TORTS (1934) § 426:

"Negligence in the Operative Detail of Doing the Work.

"Except as stated in §§ 427 to 429, an employer of an independent contractor is not liable for bodily harm caused by any negligence of the contractor which does not affect the result which the employer is under a duty to have attained but consists solely in the improper manner in which the contractor does the detail of the work necessary to obtain such result."

The application of the foregoing to the instant case is clear. Nebel (as general contractor), is not to be held liable for bodily harm caused by any negligence of the Knollman Company (an excavation work independent contractor) in damaging a public sidewalk since this negligence does not affect any result which Nebel is under a duty to have attained (the erection on private property of a bank building) but consists solely in the alleged im-

proper manner in which the excavator's trucks did a detail of the work (passing excavated material across the public sidewalk) necessary to obtain the result. In other words, damaging the sidewalk is analogous to careless dropping of a tool or to negligent driving on an approach street for which the wrongdoer involved is alone answerable to an injured pedestrian.

What the appellee general contractor was interested in was an end result of excavation of the lot. The details of excavation were not under his control. Whether the dirt was to be trundled out by wheelbarrow, garden cart, or truck, was not under his control and was collateral to his objective. If trucks were to be used, it certainly would not follow that a side walk would be damaged. It is not necessary to damage a public sidewalk in order to excavate a nearby lot for a building. If there was proof that it was done in this case and that the excavator was the damager, then he is the one who should be looked to for any damages. However, the general contractor neither authorized nor contemplated any damage to the public sidewalk by reason of the construction of the bank. Accordingly, negligence in connection with the manner of such an operative detail upon the independent contractor's part cannot be made the basis for imposition of liability upon this appellee-general-contractor.

A case that clearly applied the principles which should control disposition of this appeal is *Johnston v. Seattle Taxicab & Transfer Co.*, 85 Wash. 551, 148 Pac. 900 (1915). There, a company which had been given the contract by an owner (who also had an architect) for construction of a building sublet the excavation work to an independent contractor. Plaintiffs were injured in a taxicab which collided in the public street with a drag being used on a wagon in which earth taken from the excavation for the building foundation was being removed by the independent contractor. Liability of the principal contractor was held denied, the court saying, at 557, 902:

The act of placing the drag in the street did not relate to the act of performance of the work contracted for, but it did relate to the manner of its performance. The work contracted for was not inherently or intrinsically dangerous, and was not such as would necessarily or probably result in injuries to third persons unless measures were adopted by which such consequences could be avoided.

A recent application of the same rule is found in *Weeks v. Texas Illinois Natural Gas Pipeline Co.*, 276 S.W. 2d 321 (Tex. Civ. App. 1955) where a pipeline company and its construction contractor, who had been engaged to construct a pipeline on an easement, were *held* not liable for damage caused when a subcontractor of the construction work set a fire for the purpose of disposing of rubbish. In affirming a summary judgment, the court said, at 323:

In the present case, the injury sustained by appellants resulted not as a natural or necessary consequence of the work of installing a pipeline, but rather, it seems clear to this Court, from collateral negligence of the subcontractor in the manner in which such work was performed. Under such circumstances, the employer is not responsible.

The rule in question was one of several grounds listed as justifying a holding of non-liability in *Barrabee v. Crescenta Mut. Water Co.*, 88 Cal. App. 2d 192, 198 P.2d 558 (1948), where the defendant water company had hired an independent contractor to drill a well on its land and through the latter's alleged negligence water and topsoil overflowed onto an adjoining street and injured a motorist. The court stated that the situation did not come under any of the recognized exceptions to the rule of nonliability for contract work independently done by another. Another example of the independent contractor rule is *Becker v. Northland Transp. Co.*, 200 Minn. 272, 274 N.W. 180 (1937) (general contractor *held* not liable for an automobile collision caused by smoke drifting across the road when contractor had hired another to burn brush from the

sides of the road). Those cases where a general contractor has been held liable fall into one of the recognized exceptions to the general rule of non-liability due to circumstances which are not present in the instant case.

As shown by the foregoing authorities, the law with respect to the central issue on this appeal is clear; a general contractor is not to be held liable for negligence of an independent subcontractor in connection with a collateral matter. The remaining points in appellant's brief are peripheral and do not change the general rule of non-liability. For instance, reliance on nuisance cases misses the point as it simply ignores the fact that the sidewalk defect of which plaintiff complains was not the excavation on the owner's premises which was the result the general contractor and owner desired.

2. A building regulation on "Protection and Restoration of Adjoining Property" does not create any right of action in a pedestrian on a public sidewalk.

Evidently an afterthought, for it was not mentioned in the complaint or pretrial statement, is the reliance upon Building Regulation, "Section 308,—Protection and Restoration of Adjoining Property" which provides:

Every portion of every structure in process of construction, alteration, repair, or removal, and all neighboring property and structures or any portion thereof affected by such process or by an excavation, shall be sufficiently supported and protected by the building owner during such process; and all necessary precautions for protection of life and limb shall be taken by said building owner and his agents, who shall restore the adjoining property and structures removed or damaged by him or them to as good condition as they were immediately prior to his or their operations.

Reference in the foregoing to "building owner and his agents" was hardly intended to change the long-established principle that one may employ a competent in-

dependent contractor to excavate on a piece of land without becoming civilly liable to passers-by for negligence in operational and collateral details upon the part of such an independent contractor. So radical a departure from traditional concepts designed to foster our industrial system is not to be assumed.

It is to be noted that the regulation deals with the *excavation itself*, not with a collateral defect on an adjoining public sidewalk. Moreover, it is not a pedestrian passer-by, but the adjoining property owner, that the regulation is designed to protect. It does not create any new liability as to anyone but is merely an expression of the ancient maxim that one's own property and actions are not to be such as unreasonably to do harm to the property or person of one's neighbor. In addition, even if the regulation could be said to apply to defects in the public sidewalk, under familiar rules of construction the primary duty of the municipality to maintain the public streets would not by such a regulation be passed on so as to create a liability to a pedestrian in so far as the abutting "building owner and his agents" are concerned. Thus, in *Radinsky v. Ellis*, 83 U.S. App. D.C. 172, 167 F.2d 745 (1948), this Court in rejecting an effort by a pedestrian to recover from an abutting landowner for injuries resulting from failure to obey the District of Columbia snow-removal law, said at 173, 746:

Enactments of this kind are generally regarded as legislative efforts to require abutting property owners to aid in the performance of a municipal duty. It is held by the weight of authority that an individual does not have a cause of action against one who neglects to aid the municipality in meeting its obligations. Since it seems to us to be based on sound principle, we adopt that holding.

This decision on a snow-removal statute is also the majority rule under statutes requiring property owners to repair abutting sidewalks. ANNOT. 93 A.L.R. 799, 803 (1934).

3. There is no duty by non-creators of defects, except the municipality, to maintain a public sidewalk or to warn users of dangerous conditions therein.

Appellant's brief 7, conceding the failure of plaintiff's proof to establish that the landowner or general contractor created the alleged sidewalk defect, nevertheless asserts that they knew of these alleged conditions and did nothing to remedy them, to light them or to warn of their existence. This contention assumes that mere knowledge creates a duty to act which simply does not happen to be the law. Thus, it is said in pertinent part in extracts from *RESTATEMENT, TORTS (1934) § 349*:

"DANGEROUS CONDITIONS IN PUBLIC HIGHWAY OR PRIVATE RIGHT OF WAY.

"A possessor of land over which there is a public highway or private right of way is not subject to liability for bodily harm caused to travelers upon the highway or persons lawfully using the way by his failure to exercise reasonable care

- (a) to maintain the highway or way in safe condition for their use or
- (b) to warn them of dangerous conditions thereon which, although not created by him, are known to him and which they neither know nor are likely to discover.

. . . .

"*Illustrations:*

1. A, while walking on the sidewalk of a city street upon which a house in the possession of B abuts, is hurt by stumbling in a hole in the highway which is caused by the wear and tear and the working of the frost upon the bricks which pave it. This condition has been of long standing and is well known to the city authorities and to B. B is not liable to A.

2. The sidewalk on a city street upon which A's property abuts, is covered with hummocky snow and ice and has been in that condition to A's knowledge for a considerable time. On a dark night A sees B about to walk upon this ice in obvious ignorance of its

dangerous condition. A might easily warn B but does not do so. A is not liable to B."

4. The various contractual undertakings between owner-architect and owner-contractor do not create rights in a third party.

It is common knowledge that almost all modern building operations of substantial size utilize the standard forms of contracts adopted by the American Institute of Architects during the past thirty-odd years in order to define the obligations of owner, architect, contractor and subcontractor as between themselves. See preface to PARKER & ADAMS, *THE A. I. A. STANDARD CONTRACT FORMS AND THE LAW* (1954). Thus, the provisions relative to subcontracts read into evidence by plaintiff (J.A. 59) dealing with subcontracts and relations of contractor and subcontractor, when taken in context are clearly designed to affect only the immediate parties to the subcontract—even to the exclusion of the owner. PARKER & ADAMS, *supra*, at 52, 53. The recognized purpose of the contractual provisions for supervision by an architect is to guard the owner against deficiencies and defects of the work of contractors, but the architect does not undertake to control the detail of their work "so that no fraud or negligence can be committed by any of the contractors" See PARKER & ADAMS, *supra*, at 15, quoting from *Hubert v. Aitken*, 5 N.Y. Supp. 839, 840 (Com. Pleas. 1899).

The courts realistically recognize the nature of these relationships in the building trades. Thus, in *Trecartin v. Mahony-Troast Const. Co.*, 18 N.J. Super. 380, 87 A.2d 349 (1952), it was stated that a general contractor's mere reservation for the purpose of seeing that the contract work was done in compliance with the plans and specifications was not control of the work or manner of doing it as to impose on him statutory duties relative to the subcontractor's employees as long as supervision related only to the result and not to the method of doing the work. *Accord*, *Broderick v. Cauldwell-Wingate Co.*, 301 N.Y. 182, 93 N.E. 2d 629 (1950).

5. Plaintiff's lack of due care for her own safety precluded a recovery.

Presumably (although the trial court did not so state and was not required to do so), the directed verdict was based upon the principles already discussed herein. However, if prevailing conditions were really as dark as plaintiff tried to make them out (J.A. 16, 24, R. 38), she was not entitled to a verdict. When asked how many steps into the alleged broken area she went before turning her ankle, her estimate was "maybe six or eight steps (J.A. 16). This was despite her claim of having felt the roughness.

"Q. It being very dark and you feeling it rough, you proceeded on whether you could see the ground or not? Is that right?

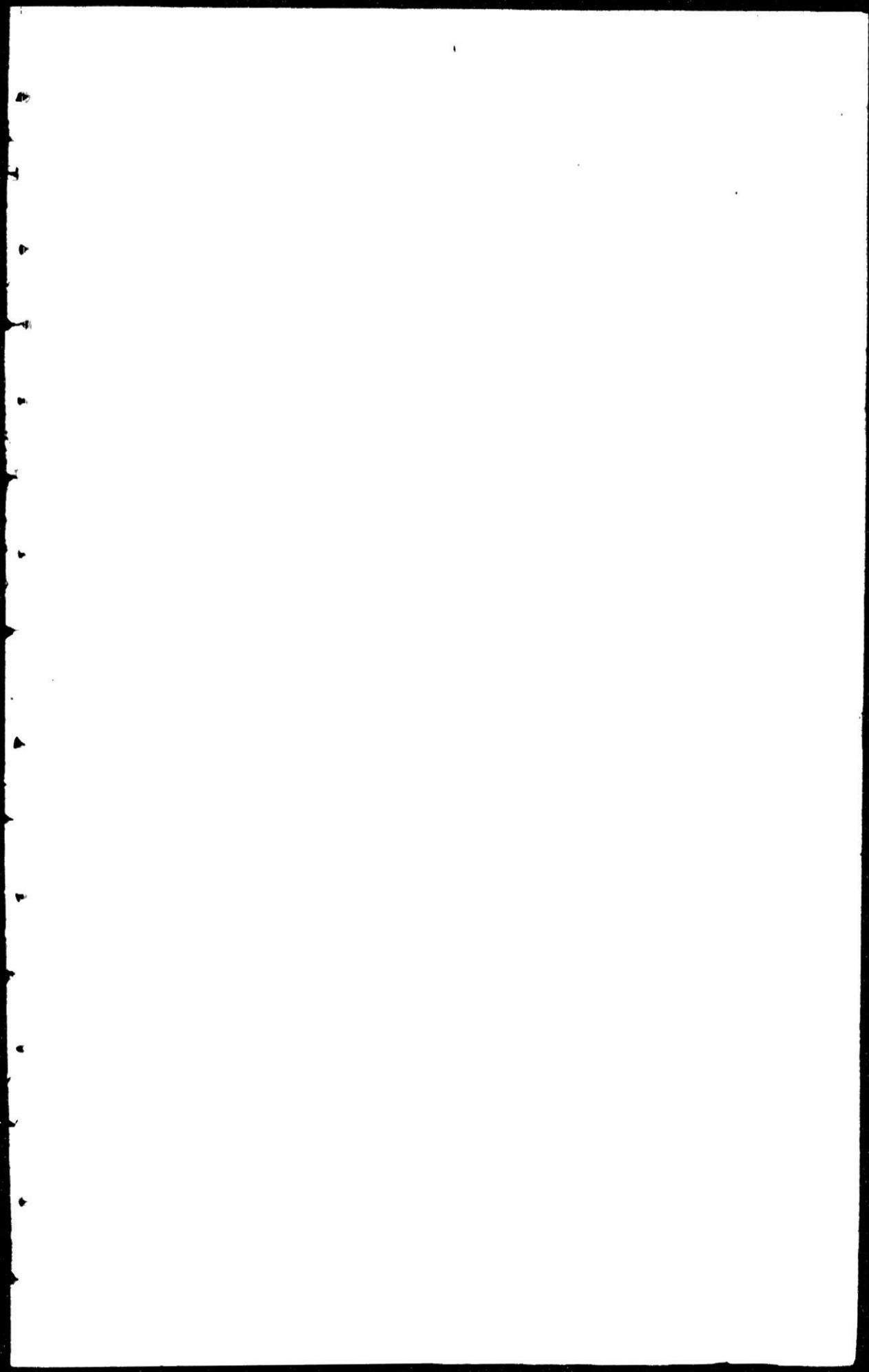
A. Yes, sir, I walked on." (J.A. 16)

While the photographs in evidence do not reflect particularly hazardous footing for one aware, as plaintiff was, of walking in a roughened area, and while the only estimate of the cement flaking at the place plaintiff claimed to have fallen was that it was not as much as an eighth of an inch deep (J.A. 71), if conditions were as horrendous as plaintiff says, she was contributorily negligent as a matter of law in recklessly proceeding when there was a lighted way on the opposite side of the street (J.A. 24). For this reason alone, the trial court's disposition of the case should be affirmed.

Respectfully submitted,

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BRIEF FOR APPELLEE
ANACOSTIA NATIONAL BANK

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

—
No. 13,479
—

SUDIE PHIPPS MERRIAM,
Appellant,

v.

ANACOSTIA NATIONAL BANK, AND JOSEPH F. NEBEL,
Appellees.

—
Appeal from the United States District Court
for the District of Columbia
—

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Question Presented

The question presented is whether ^{an owner who contracts with} a general contractor to construct a building is liable for an independent subcontractor's alleged negligence in an operational detail upon a nearby public sidewalk.

INDEX

	Page
Counter-Statement of the Case	1
Summary of Argument	2
Argument	2
Conclusion	4

TABLE OF CASES

Aeta v. John Beno Co., 206 Iowa 136, 222 N.W. 386	3
Brucker v. Town of Covington, 69 Ind. 33	4
Guiccardi v. Chisholm, 40 F. Supp. 581.....	4
Moore v. Philips, 120 S.W. 2d 722, 197 Ark. 31.....	4
Regan v. Superb Theatre, Inc., 220 Mass. 259, 107 N.E. 984	3
Sartirana v. N. Y. County National Bank, 139 N.Y. App. Div. 597, 124 N.Y.S. 197	2
Swearsky v. Stanley, 186 A. 556	3

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**BRIEF FOR APPELLEE
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Counter-Statement of appellee. Anacostia National Bank

The appellee, Anacostia National Bank, joins in and adopts the Counter-Statement of the case contained in the Brief for the Appellee, Joseph F. Nebel. It would add to such Counter-Statement only that the motion for a directed verdict made at the close of plaintiff's case was made by both appellees, Joseph F. Nebel and Anacostia National

Bank, and that the motion was granted by the Trial Court as to both.

Summary of argument

Since the general rules of liability or non-liability applicable to a general contractor for the alleged negligent acts of a sub-contractor engaged by it are applicable also to the non-liability of an owner who, as in the instant case, engages a general contractor who, in turn, engages a sub-contractor, this appellee adopts the summary of argument contained in the Brief of the co-appellee, Joseph F. Nebel, as its own, with this exception only; namely, that the salutary rule which provides that a general contractor shall have no liability for the acts of negligence of its sub-contractor, except in certain restricted instances not here applicable, apply with even greater force in the case of an owner. The real basis for such exemption from liability is that of public policy.

The argument presented to the Court by the co-appellee with respect to the collateral contentions of the plaintiff, to-wit, that there was a retention of supervision because of the employment of an architect, the existence of the building regulations set forth in both the Brief for the appellant and the co-appellee are, for the very strong reasons indicated by the co-appellee just as valid in the case of an owner as in the case of a general contractor.

ARGUMENT

To the authority cited by the appellee, Joseph F. Nebel, this appellee respectfully calls the Court's attention to the following additional authorities:

Sartirana v. N. Y. County National Bank, 139 N.Y. App. Div. 597, 124 N.Y. Supp. 197. This was an action to recover for personal injuries wherein it appeared that the defendant bank was the owner of certain premises in the City of New York and had employed a general contractor to erect a building thereon. The latter sublet portions of the work

including setting of stone. The stone firm erected a hoist for the purpose of hoisting stone from the street. Plaintiff, while walking on the sidewalk, was struck on the head by a corner of the platform of the hoist as it was being lowered from the top of the building to the street. In exempting the bank from liability, the Court indicated that the case was not exceptional in any way; that the building was not of extra-ordinary height or at all out of the ordinary, and unless the owner is in every case bound to guard against possible injuries to passers-by, which is not the Law, the bank could not be held liable for the negligence of independent contractors or sub-contractors.

Aeta v. John Beno Co., 206 Iowa 136, 222 N.W. 386, where plaintiff sued for injuries caused by a fall over a ladder left on a sidewalk by an independent contractor engaged to wash windows in the defendant's store, the Court held the owner of the property not to be liable for the negligence of its independent contractor.

So in *Regan v. Superb Theatre Inc.*, 220 Mass. 259, 107 N.E. 984, a like holding exempted the owner of a theatre from liability in the suit of a pedestrian who was injured on a public sidewalk from the upsetting of a staging erected by the employees of an independent contractor for use by them in painting a marquee over the entrance to defendant's theatre. Similarly, the Appeals Court of Connecticut in the case of *Swearsky v. Stanley etc.*, 186 A. 556, announced the rule to exempt the owner of a store building to be free of liability to a pedestrian on a public sidewalk fronting its store property who was injured by a fall caused by negligence of its independent contractor engaged to wash its windows and who permitted soapy water to flow onto the sidewalks rendering them slippery. The general rule of freedom from liability for negligent acts of a sub-contractor is well stated in the instant case.

In support of the rule that the owner of real estate who engages a general contractor for the performance of work upon his property is not legally responsible for the negli-

gence of such contractor his subcontractors, even though the owner retained the limited power of general supervision by means of an architect, we cite the cases of *Gucciardi v. Chisholm*, 40 F. Supp. 581 and *Moore v. Phillips*, 120 S.W. 2d 722, 197 Ark. 31, the former case holding that limited power of general supervision does not make a general contractor liable for the acts of his sub-contractor negligently performed and the latter holding that the right of supervision by an owner under a contract for work for the purpose of determining whether the work is being done in accordance with the contract, and the exercise of such right of supervision, do not affect the relationship of independent contractor or change it to a master-servant relation.

Finally, in support of the argument advanced by co-appellee, Joseph F. Nebel, that the plaintiff was properly denied recovery by reason of her own negligence, we call to the Court's attention the case of *Brucker v. Town of Covington*, 69 Ind. 33, wherein the Court held that if the plaintiff knows of the existence of an opening in the sidewalk and attempts to pass it at night, he will be considered as assuming the risk even though at the time he has forgotten the existence of the opening.

CONCLUSION

For the many cogent reasons advanced in the Brief of the co-appellee, Joseph F. Nebel, as well as by reason of the authorities herein contained, it is respectfully submitted that the ruling of the Trial Court was the only ruling that could properly be made.

Respectfully submitted,

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